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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1576,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court can abolish a seniority system that was not found to have been established or maintained as a result of discriminatory intent, in order to remedy a violation of Title VII of the Civil Rights Act of 1964, which could be completely remedied without changing the seniority system in any respect.

2. Whether, consistent with the national labor policy as expressed in the National Labor Relations Act and the Landrum-Griffin Act, and consistent with the principle of *Milliken* v. *Bradley*, a federal court can abolish an autonomous local union that is the chosen bargaining representative of employees in a proper single-employer bargaining unit, and also abolish the bargaining unit, by ordering merger with other local unions in a different multi-employer bargaining unit, in order to remedy a violation of Title VII of the Civil Rights Act of 1964 that was committed by the other local unions.

3. Whether a federal court can order major changes in the business operations of an employer, in a way that jeopardizes his continuing business, in order to remedy a violation of Title VII of the Civil Rights Act of 1964, where such changes are not necessary to provide a complete remedy for that violation.

4. Whether the court of appeals in this case, by substituting its judgment for that of the district court regarding an appropriate remedy, deviated impermissibly from the established principles governing allocation of remedial responsibility between the district courts and the courts of appeals.

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the Court of Appeals:

Local 307 and Local 851, International Longshoremen's Association, AFL-CIO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Local 1576, International Longshoremen's Association, AFL-CIO, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 13, 1980.

OPINIONS BELOW

The original opinion of the district court is reported at 334 F.Supp. 976 (S.D. Tex. 1971) and is reprinted herein as App. E (38a-49a). The first opinion of the court of apeals is reported at 511 F.2d 273 (CA5 1975) and is reprinted herein as App. D (23a-37a). This Court's denial of a petition for certiorari to that judg-

ment is reported at 423 U.S. 994 (1975) and is reprinted herein as App. C (22a). The decision of the district court on remand is unreported; it is reprinted herein as App. B (13a-21a). The second decision of the court of appeals—the decision from which certiorari is sought—is reported at 623 F.2d 1054 (CA5 1980) and is reprinted herein as App. A (1a-12a).

JURISDICTION

The court below entered judgment on August 13, 1980, App. F (50a-51a). On October 30, 1980, Mr. Justice Powell extended the time for filing this petition to and including January 10, 1981, App. G (52a).

This Court has jurisdiction to review the judgment of the court of apeals by certiorari, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-2(c), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an

applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 706(g), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-5(g), provides in pertinent part as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) of this title.

STATEMENT OF THE CASE

This action was brought, pursuant to Title VII of the Civil Rights Act of 1964, by the Attorney General on behalf of the United States. The defendants were the International Longshoremen's Association ("ILA") and

its affiliated local unions on the Texas Gulf Coast.[1] The Complaint alleged that defendants were engaged in a pattern or practice of discrimination on the basis of race or national origin. The complaint alleged (1) that defendants maintained segregated local unions and hiring halls in each port; and (2) that in each port the segregated locals had a practice of dividing the available work in a discriminatory manner. The primary relief that the United States sought in this action was merger of all local unions performing similar work in each port. Although the original proceedings covered all the Texas Gulf ports, the case as it comes to this Court is limited to the local unions in the Port of Galveston.

There are four ILA local unions in the Port of Galveston. Each of the locals operates a hiring hall, maintains its own seniority system, and supplies longshore workers to perform work for the stevedoring companies that load and unload cargo in the Galveston port. Three of those locals were found by the district court to be part of the discriminatory system alleged in the complaint. The other local—petitioner here—was found not to be part of that system. Nonetheless, the court of appeals has ordered that petitioner be merged with the other local unions, and that a single hiring hall and seniority list be established.

A. Under the terms of its charter with the ILA, petitioner, Local 1576, has exclusive jurisdiction over the handling of bananas and green fruit; the cargo that Local 1576 actually handles is virtually all bananas. The other three locals in Galveston have exclusive jurisdiction over general cargo other than bananas and green fruit. The three general-cargo locals are in a single

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[1] The action was brought under section 707(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a). The jurisdiction of the district court was founded on section 707(b) of the Act, 42 U.S.C. § 2000e-6(b). Pursuant to the 1972 amendments to the Act, the EEOC was substituted as a party in place of the United States. Sections 707(c) and (d) of the Act, as amended; 42 U.S.C. § 2000e-6(c)-(d).

bargaining unit. They negotiate jointly with and are parties to a master agreement with a multi-employer association known as the West Gulf Maritime Association ("WGMA"). Local 1576 is in a separate bargaining unit. It is not a party to any agreement with the WGMA, but negotiates separately with Southern Stevedoring Co., the only stevedore company that handles bananas. That separate bargaining unit is consistent with National Labor Relations Board precedent defining separate units of banana handlers as appropriate bargaining units in the longshore industry.[2] The separate local union was created in accord with the ILA's practice of chartering a separate local union for the sole purpose of banana handling in ports that have a significant amount of banana cargo.[3]

The specialized banana jurisdiction serves important interests of banana shippers. When a banana ship arrives in port, the highly perishable cargo must be unloaded quickly. The market is also highly competitive, to the degree that a small difference in cargo-handling costs will cause banana shippers to choose one port over another. Gangs of longshoremen who specialize in banana handling and who regularly work together unloading banana ships are more efficient than general longshoremen, who may handle different cargo every day.[4]

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[2] *Mobile Steamship Ass'n*, 8 N.L.R.B. 1297, 1313-1314 (1938); *Aluminum Line*, 8 N.L.R.B. 1325, 1343-1344 (1938).

[3] See *Southern Stevedoring Co.*, 230 N.L.R.B. 609, 611 & n.10 (1977).

[4] As a reflection of these business interests, although Local 1576's contract with Southern Stevedoring Co. consistently has provided the same wages and benefits to banana handlers that the WGMA contract provides to the general-cargo longshoremen referred by the other locals to the other employers, Local 1576's contract contains certain special provisions not in the WGMA contract, designed to keep bananas moving: one is an agreement to keep working through contract negotiations without any strikes and, in the event of a

The experience of Local 1576 in the Port of Galveston has confirmed the advantages of specialization in banana handling. The quantity of bananas imported through Galveston was very low until the late 1960s. In 1970 the fruit companies began to bring a greater quantity of bananas into Galveston, and the volume of banana business has subsequently increased. That banana business is in Galveston because of Local 1576's superior efficiency in banana handling, and the members of Local 1576 have a special pride in their success at attracting the highly competitive banana business to Galveston and keeping it there.

The president of Southern Stevedoring testified, in support of Local 1576's request to be left out of a merger, that the efficiency of his banana handling operation and his ability to compete in the banana market were the result of the specialized crews that he obtains through the Local 1576 hiring hall. He testified that referral through a general hiring hall, not limited to banana referrals, would reduce that efficiency and could cause the banana shippers to move their business to another port.

The Galveston banana handlers have repeatedly expressed their choice to be represented by Local 1576, rather than by the general-cargo locals. The charter of Local 1576 was originally issued in 1937. It became inactive in the mid-1950s, when the ILA was expelled from the American Federation of Labor and the rival union, the International Brotherhood of Longshoremen, was formed. In 1962 the longshoremen who were then performing banana handling work in Galveston through the rival union, approached the ILA and asked that the

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strike, to provide 30 days notice in addition to all other notice required by law, so that banana ships can be diverted to a different port; another provides that banana unloading, unlike other longshore work, does not stop for rain, but stops only if conditions are hazardous (the clause has never been invoked, not even when a hurricane was just off the Coast.)

dormant charter of Local 1576 be activated. ILA complied with their request, and Local 1576 became their representative. During the pendency of this lawsuit, Local 1576 has repeatedly taken votes among its members and other longshoremen who have done banana handling work, and each vote has been unanimous in favor of separate representation by Local 1576 and opposed to merger with the general-cargo locals.

The members of Local 1576, and the other longshoremen who use its hiring hall, are predominantly Mexican-American. One of the three general-cargo locals, Local 307, is predominantly white;[5] the other two general-cargo locals, Local 329 and Local 851, are predominantly black.

The three general-cargo locals were all chartered by the ILA in the early part of the 20th century. By the mid-1920s they had arrived at their current formula for sharing the work provided to their bargaining unit by the general-cargo stevedores: Local 329 has exclusive jurisdiction over the work of four particular stevedoring companies; Local 851 and Local 307 divide the remaining work equally.[6]

The hiring hall operated by Local 1576 is open to anyone who wants work as a banana handler, including members of the other local unions. Among those who show up at the hiring hall on any given day, the first persons selected for work are those who have accumulated seniority by working out of the Local 1576 hiring hall, in seniority order. In recent years the schedule of

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[5] We use the term "white" in this petition, following the lower courts' usage, to refer to white longshoremen who are not of Mexican descent. At some places in the record the term "Anglo" is used with the same meaning.

[6] The history of Local 329's exclusive rights to the work of four stevedores is described in *Local 851, International Longshoremen's Ass'n*, 194 N.L.R.B. 1027, 1028-1029 (1972).

banana shipments has been such that applicants without seniority are regularly selected for work on Mondays, and anyone who works regularly on Mondays alone can obtain seniority status in Local 1576.

Local 1576 has never discriminated against anyone in membership or referral for work. As the volume of banana work has increased, the number of black and white longshoremen who have been referred for work through the Local 1576 hiring hall and have become members of Local 1576 has also increased. Local 1576 has sponsored radio advertisements in English and Spanish and has called other ILA locals, to recruit additional longshore workers to unload the banana ships in port on Mondays.

B. This action was tried, as to all the Texas Gulf locals, in 1970. The district court found that the maintenance of separate locals by itself did not violate Title VII. The court found a violation of the Act, however, in the prevailing practice of dividing work on a 50-50 basis between white and black local unions in each port (45a, 48a). The district court found that Local 1576 had never been part of that practice. Indeed the court found that Local 1576 was not involved in the division of general-cargo work in Galveston but worked only in its own specialized jurisdiction regardless of the relative volume of work available to it and to the other locals. (The banana handling work was never divided, but was all done by Local 1576.) The court did not find that the separation of work in Galveston between general cargo and banana handling was discriminatory, or that it otherwise violated Title VII (47a).[7]

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[7] The district court's only conclusion regarding Local 1576 was that its members had been denied work opportunities "because of the restrictions on its charter," to the handling of bananas and green fruit (47a).

On the question of relief for the 50-50 division of work between white and black locals, the district court held that merger of the locals was not necessary in order to remedy the violation, but that a common hiring hall should be established, with a common seniority system (48a-49a). The district court accordingly entered an interlocutory decree denying the Government's request to merge the local unions, and ordering that a single common hiring hall be established in each port.

The Government took an interlocutory appeal, pursuant to 28 U.S.C. § 1292(a)(1), from the district court's refusal to order merger of local unions, and the court of appeals reversed. Citing the district court's finding that the practice of dividing work 50-50 between white and black locals had deprived longshoremen of equal employment opportunity on the basis of race or national origin, the court held that "merger of segregated locals [is] mandatory whenever they are shown to have had actual discriminatory effect on employment opportunities," (37a).[8] Accordingly, the court of appeals remanded the case for the district court to enter an order merging the segregated local unions in each port. A petition for certiorari was filed on behalf of a group of defendants that included Local 1576; it was denied (22a).

While the interlocutory appeal was pending, Local 1576, joined by the three general-cargo locals, filed a motion asking the district court to exclude Local 1576 from the common hiring hall required by the interlocu-

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[8] Judge Goldberg, who wrote the opinion for the court describing the facts and affirming the court's jurisdiction over the interlocutory appeal, wrote that he would have held that employment discrimination is "*inherent* in segregated locals" (35a; emphasis in original). The other two members of the panel, in a separate opinion written by Judge Thornberry, reached their decision on the grounds quoted in the text, "without holding that segregated locals constitute a per se violation of Title VII" (36a).

tory decree. Following the remand from the court of appeals, the district court heard evidence on this motion, treating it as a motion to exclude Local 1576 from the merger of the other local unions in Galveston. In the course of the hearings, the other three Galveston locals changed their position on the question, and opposed Local 1576's request for exclusion. On October 1, 1979, the district court granted the motion for exclusion and dismissed Local 1576 as a defendant in the case (13a-21a).

The district court supported its ruling with extensive findings to the effect that Local 1576 had no part in the Title VII violation that had been found with respect to the other locals, and that it would be unjust to include Local 1576 in the merger. The district court found that Local 1576 had "never discriminated against members of any racial group" in admitting applicants to membership or in referring applicants for work (16a, 20a). The district court found that Local 1576 had never been part of the general-cargo agreement or the division of general-cargo work between the black and white locals, but had its own separate work jurisdiction and separate collective bargaining agreement with a different employer (14a-15a, 17a). The district court also found that the members of Local 1576 were unanimously opposed to merger, and that including Local 1576 in the merger would be unjust, because the members of Local 1576 had worked hard to establish themselves in the banana market, while the other locals had refused to have "anything to do with Local 1576" (16a, 18a), and that the relative seniority of the banana handlers and the other longshoremen was such that a merger would place the banana handlers at the bottom of the list and deprive them of the banana trade they had worked to develop (15a, 18a-19a). The court also found, based on these facts and the testimony of the president of Southern Stevedoring, that because the merged union and its common hiring hall would no

longer guarantee the employer that he would receive efficient specialists experienced in banana handling, the result could be that the banana industry would take this business to another port (19a).

On appeal by the EEOC and two of the other local unions, the court of appeals reversed.[9] It held that the doctrine of law of the case required that Local 1576 be included in the merger. The court of appeals did not purport to disturb any of the district court's findings. However, notwithstanding the district court's findings to the contrary, the court of appeals asserted that Local 1576 "has been part of a system which operates to discriminate against people because of race and national origin" (10a). In light of this assertion, the court of appeals held that it was immaterial that Local 1576 had never discriminated against anyone (10a) and that merger would be unjust to members of Local 1576 (11a-12a). The court of appeals therefore remanded the case with instructions to merge all four local unions in the Galveston port (12a). The court of appeals' opinion makes clear that its instructions require not only merger of the local unions but also the establishment of a single hiring hall with a single seniority list based not on seniority in any one hiring hall but on seniority in the port (10a-12a).

REASONS FOR GRANTING THE WRIT

The court of appeals' judgment is squarely contrary to the decisions of this Court on the meaning and application of Title VII, and it also conflicts with standards adopted by other courts of appeals to govern remedial

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[9] Upon dismissing Local 1576 from the case, the district court directed entry of a final judgment pertaining to Local 1576, pursuant to Rule 54(b), Federal Rules of Civil Procedure, thus allowing immediate appeal even though final judgment had not been rendered as to the remaining defendants (21a).

orders under Title VII. As we describe in sections I through IV below, it conflicts with this Court's decisions and the decisions of other courts of appeals, in ordering the abolition of a seniority system without a finding that it is unprotected by § 703(h) of Title VII; in destroying a separate bargaining unit and an independent local union without any attempt to accommodate Title VII to the rights that exist under the National Labor Relations Act and the Landrum-Griffin Act; in ordering a radical change in business operations that is not necessary to remedy a violation of Title VII; and in departing from the rules that govern the allocation of remedial functions between the district courts and courts of appeals in the federal system.[10]

In order to place the discussion that follows into its proper context, it is important to understand the basis for, and the consequences of, the court of appeals' order for merger. That order was entered despite the district court's finding that Local 1576 had not violated Title VII and was not part of the system that had been found discriminatory—a finding that the court of appeals did not disturb—, in the absence of any finding that the establishment or maintenance of Local 1576's separate bargaining unit and seniority system was discriminatorily motivated, and despite the district court's conclusion that including Local 1576 in the merger would be unjust to the banana handlers, who are innocent of any unlawful conduct. The inclusion of Local 1576 in the merger is neither necessary nor appropriate as a remedy for the only violation of Title VII that has been found in this case—the practice of dividing identical work between the three local unions

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[10] The court of appeals professed to be bound by the "law of the case" from its decision on the interlocutory appeal in this case (7a-10a). Whatever the merits of that decision on its own terms, this Court is not bound by the law of the case in these circumstances. *See Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973).

—one white and two black—that handle general-cargo work. That violation can be remedied completely by a remedy restricted to the general-cargo local unions, without any change in the operation of Local 1576 or its seniority system.

In addition, the decision of the court of appeals has unusually severe consequences. Including Local 1576 in a merger with the general-cargo local unions will deprive the Galveston banana handlers of their chosen bargaining representative. The merger order will destroy the separate bargaining unit for banana handlers, which conforms with applicable precedents of the NLRB. Thus, instead of leaving the banana handlers to bargain with their own employer through their chosen bargaining representative, it will place them in a multiemployer bargaining unit, with representation by a single merged union they do not want for their representative. The merger order will destroy Local 1576 as a political entity. The merger order will abolish the current seniority system in Local 1576, thus destroying the seniority preference that banana handlers now have based upon their time in banana work, allowing other longshoremen to claim their work based upon their greater seniority in the port. The inclusion of Local 1576 in the merger order will also unnecessarily jeopardize the continuation of an innocent employer's business. Southern Stevedoring will no longer get specialized longshore gangs for banana handling through the referral system it prefers, but will be required to accept as employees longshoremen who have never worked for it before through a referral system that will reduce the efficiency of the banana handling operations, and efficiency is the key to the success of Southern's business. At the same time the banana handlers will have to accept work with employers for whom they have never worked.

I. THE DECISION OF THE COURT OF APPEALS ORDERING ABOLITION OF A LAWFUL SENIORITY SYSTEM IS CONTRARY TO THE APPLICABLE DECISIONS OF THIS COURT AND IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

In *Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court held that Congress in enacting Title VII intended to extend a measure of protection to seniority rights, and that a seniority system cannot be found unlawful unless it was established or maintained as the result of an intent to discriminate. *Id.* at 355-356; *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82-83, n.13 (1977).

In this case Local 1576 maintains a bona fide seniority system, in a bargaining unit separate from the general-cargo unit. Neither Local 1576 nor the employer with whom it bargains have violated Title VII, and there is no evidence and no finding that the separate seniority system based on seniority in banana handling was established or maintained with an intent to discriminate. The violation of Title VII committed by other parties can be remedied without any alteration of the Local 1576 seniority system. Nonetheless, the court of appeals ordered the Local 1576 seniority system merged into that of the other locals in a different bargaining unit with different employers, thus destroying the legitimate expectations of the banana handlers with respect to their seniority rights.

Contrary to the decision below, at least one other court of appeals has recognized that the *Teamsters* principle prohibits the federal courts from ordering changes in a lawful seniority system, for the purpose of remedying other violations of Title VII, where such changes are not necessary to put victims of discrimination in their "rightful places." In *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625 (CA4 1978), *cert. denied*, 440 U.S. 981 (1979), the Fourth Circuit held that the district court could not order

a change from the use of department seniority to plant seniority for purposes of layoff, in a lawful seniority system where the victims of the employer's other unlawful practices were adequately protected by "rightful place" remedies. 585 F.2d at 651-652. The court of appeals' decision in this case, ordering the abolition of a separate seniority system based on banana seniority, in favor of a merged system based on port seniority, is in conflict with the ruling of the Fourth Circuit in *Sledge*.[11] The Fifth Circuit here ordered a far more drastic change in seniority rights than the change ordered by the district court in *Sledge*, despite the fact that the banana seniority system is not unlawful and the violation that was found—here with respect to other local unions and other employers—can be fully remedied without any change in the banana handlers' seniority.

The writ should be granted on this question to resolve the conflict between the Fifth and Fourth Circuits regarding the power to change lawful seniority systems as part of a remedial order, and to correct the Fifth Circuit's disregard for the principles expressed in *Teamsters*.

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[11] The court of appeals' decision is also in conflict with the decision of the Ninth Circuit in *United States* v. *Navajo Freight Lines, Inc.*, 525 F.2d 1318 (CA9 1975). The Ninth Circuit held there that employees can "be required to sacrifice seniority advantages *only to the extent necessary* to permit discriminatees to achieve their 'rightful place.'" *Id.* at 1327 (emphasis added). This decision pre-dates *Teamsters, supra*, and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), but its principle is reinforced by those cases. (Although *Franks* held that § 703(h) does not restrict the power to award appropriate relief for violations, 424 U.S. at 761-762, it did so in a context in which the petitioners did not seek "modification or elimination of the existing seniority system," but only an award of their "rightful place" seniority status within that system, *id.* at 758.)

II. THE DECISION OF THE COURT OF APPEALS ORDERING ABOLITION OF A LOCAL UNION AND A BARGAINING UNIT ARE CONTRARY TO THE DECISIONS OF THIS COURT REQUIRING THAT TITLE VII BE APPLIED IN A MANNER CONSISTENT WITH OTHER STATUTES EXPRESSING THE NATIONAL LABOR POLICY, AND TO THE PRINCIPLE OF *MILLIKEN* v. *BRADLEY*.

A. This Court has repeatedly expressed the principle that Title VII cannot be applied in a vacuum but must be interpreted and administered in a way that will accommodate its commands to the other statutes that embody the national labor policy. In *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 69 (1975), the Court cautioned that the rights secured by Title VII "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the [National Labor Relations Act]." In *Trans World Airlines, Inc.* v. *Hardison, supra*, the Court began its analysis with the proposition that "Collective bargaining . . . lies at the core of our national labor policy," 432 U.S. at 79, and that the principles of that labor policy will not be made to "give way" to Title VII "[w]ithout a clear and express indication from Congress" that it intended such a result, *id.* In *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 608 (1980), the Court again declared that

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment.

In each of these cases, this Court interpreted Title VII against the backdrop of the National Labor Relations Act, in order to accommodate the statutes' respective

requirements and to avoid a reading of Title VII that would interfere with the operation of the earlier statutes. The character of the necessary accommodation between Title VII and the other statutes is suggested by *Teamsters*, which requires the federal courts in granting remedies for violations of Title VII to strike an "equitable balance . . . between the statutory rights of victims and the contractual rights of nonvictim employees," 431 U.S. at 376. The courts are directed to "look to the practical realities and necessities" to determine the "special blend of what is necessary, what is fair, and what is workable," *id.* at 375.

The national labor policy includes, as its first principle, the right of employees to "bargain collectively through representatives of their own choosing," 29 U.S.C. § 157,[12] and employees are given protection against representation by unions they have not freely selected as their bargaining representative. *Id.* §§ 158(a)(1), (2), 159; *see, e.g., International Ass'n of Machinists* v. *N.L.R.B.*, 311 U.S. 72, 79, 82 (1940). The National Labor Relations Act (NLRA) entrusts to the NLRB the primary responsibility for determining what is an appropriate bargaining unit, 29 U.S.C. § 159. The Landrum-Griffin Act, enacted in 1959, establishes and protects the political rights of union members in relation to their unions, 29 U.S.C. § 411.

The court of appeals in this case made no attempt to accommodate its remedial order under Title VII with the rights of the members of Local 1576 under the NLRA and the Landrum-Griffin Act. Without so much as a word indicating that merger was necessary to cure the Title VII violations committed by other parties in another

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[12] This policy was reiterated in the Landrum-Griffin Act, 29 U.S.C. § 401(a), declaring that "it continues to be the responsibility of the Federal Government to protect employees' rights to organize [and] choose their own representatives . . . ."

bargaining unit, the court ordered that the members of Local 1576 be deprived of their chosen bargaining representative; that their bargaining unit, though in accord with NLRB precedents, be abolished; and that they henceforth be part of a local union that they unanimously oppose for their representative. The order also materially changes the relationship of the members of Local 1576 to their union, abolishing Local 1576 as a political entity and substituting for it a larger union composed of employees with a range of interests different from those of the banana handlers.[13] This action by the court of appeals is in conflict with this Court's decisions, cited above, requiring accommodation of Title VII to the other statutes that express the national labor policy.

Not only did the court of appeals fail to consider whether merger of Local 1576 was necessary, it also took no account of the fact that a merger including Local 1576 is not even an appropriate remedy for the practice of dividing general-cargo work between racially separate locals. The situation of Local 1576 is unlike the situation of the general-cargo locals in Galveston. In the case of the general-cargo locals, where separate locals are found within a single bargaining unit, bargaining jointly with the same employer, and the only difference between them is the race of their members, it might be found that merging those locals would " 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination," *Teamsters* v. *United States*, *supra*, 431 U.S. at 372, quoting from *Franks* v. *Bowman Transportation Co.*, *supra*. In that situation, merger might be found to end the artificial separation of a single

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[13] Cf. *Emporium Capwell*, *supra*, 420 U.S. at 64 (a unit appropriate for collective bargaining is "a group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctly different interests in the terms and conditions of their employment").

bargaining unit into distinct racial entities.[14] In the case of Local 1576, however, merger would not create the "conditions and relationships" that would have existed absent discrimination; the representation of banana handlers by a separate local in a separate bargaining unit with a separate employer has been neither shown nor found to be the result of race or national origin. It is no different from a situation in which two separate manufacturing companies were found side by side, one with a white workforce and the other with a black workforce, each with a separate bargaining unit and a separate local union. There can be no doubt that in such a circumstance a federal court would lack power under Title VII to require merger of the two employers or the two local unions, even if the court thought it would be desirable abstractly to have a single racially mixed local rather than two "segregated" locals: Merger in that circumstance would not create the "conditions and relationships that would have existed absent discrimination. The appropriate remedy would be to enjoin any further discrimination by the employers or the unions (if they have themselves committed violations) and to provide "rightful place" remedies to all identified victims of discrimination. *Teamsters* v. *United States, supra; Franks* v. *Bowman Transportation Co., supra.*

B. The decision of the court of appeals also conflicts with the decisions of this Court that limit the exercise of the federal equitable power in relation to independent

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[14] Even though it might be found that merger of such segregated unions would create the relationships that would have existed absent discrimination, the courts in deciding whether to order such a merger would still be obligated to consider the other values of separate unions, such as political autonomy and honoring the members' choice of bargaining representative, in order to accommodate the Title VII remedy to the national labor policy. Merger of separate hiring halls and seniority lists could be a sufficient remedy without actual merger of the local unions.

political entities. In *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974), this Court reversed a court of appeals decision providing for injunctive relief mandating "cross-district or interdistrict consolidation to remedy a condition of [school] segregation found to exist in only one district."[15] The Court held that the boundary lines of separate school districts could not be bridged with interdistrict remedies where the constitutional violation that was found had occurred in only one of the districts and was not the cause of significant segregation in the adjoining districts. *Id.* at 741, 744-745. The Court summarized its holding, *id.* at 746:

> Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.

The treatment of autonomous local unions must parallel the treatment of autonomous local school districts. Just as local control over schools is a "deeply rooted" and important concern, *id.* at 741-742, control of a local union by the employees who work in the bargaining unit it represents is a central and important concern of national labor policy. See authorities cited at pages 17-18, *supra*. The conditions that would allow a decree consolidating separate local unions under the principle announced in *Milliken* do not exist in this case. Local 1576 has been found to have committed no violation of Title VII, and Local 1576 was not a part of the system of dividing general-cargo work among the other three locals that was found to violate Title VII. The court of appeals' decision is therefore in conflict with the controlling principle stated in *Milliken*.

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[15] The Court subsequently, in *Hills* v. *Gautreaux*, 425 U.S. 284, 294 & n.11 (1976), stated that the principles declared in *Milliken* were not confined to school desegregation cases but apply generally to the exercise of equity power by the federal courts.

The writ should be granted to correct the court of appeals' failure to consider the necessity for accommodating its Title VII remedies to the rights of employees under the NLRA and the Landrum-Griffin Act and its failure to observe the limits that the principle announced in *Milliken* imposes upon the Title VII remedial power.

III. THE DECISION OF THE COURT OF APPEALS ORDERING MAJOR CHANGES IN BUSINESS OPERATIONS IS IN CONFLICT WITH THE HOLDING OF ANOTHER CIRCUIT.

In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), this Court considered the power of a federal court to order changes in a party's business operations. Holding that federal courts cannot order a remedy against an employer that had not violated the Act, the Court said, *id.* at 578:

> Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.

At least one other court of appeals has adopted a standard that forbids the use of Title VII remedial power to restructure business practices, even where a violation is found, unless such a remedy is necessary to cure a violation of the Act. In *EEOC* v. *Local 14, International Union of Operating Engineers*, 553 F.2d 251 (CA2 1977), the district court had issued a broad injunction that required, *inter alia*, that two separate local unions merge their hiring halls. The Second Circuit reversed, adopting a rule that relief for a Title VII violation cannot interfere with the defendant's business operations any more than is necessary to remedy the violation, and ordering the district court to receive evidence and make findings on the effect that the remedial order would have on the defendant unions and the contractor associations

who obtained employees through the hiring halls. *Id.* at 256-257.[16]

The court of appeals' decision in this case is in conflict with the ruling of the Second Circuit in *Local 14* and the principle expressed by *Furnco*. The order to merge Local 1576 into the other locals, an extreme measure that is not necessary in order to remedy the discriminatory division of general-cargo work, will have the effect of abolishing the separate hiring hall now operated by Local 1576 and changing the work-referral system from one that now supplies Southern Stevedoring with gangs of specialized, efficient banana handlers to a system that will require the employer to accept longshoremen who have no special experience or interest in banana handling. This change was ordered by the court of appeals despite the employer's plea to be allowed to continue the specialized work referral system and despite the district court's finding that the end of the specialized referral system may bring about the end of banana shipments into Galveston and thus destroy Southern Stevedoring's banana trade.

The writ should be granted to resolve the conflict between this decision of the Fifth Circuit—ordering a substantial change in business operations which was not necessary to remedy the Title VII violation—and the contrary decision of the Second Circuit in *Local 14*.

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[16] *See also United States* v. *International Longshoremen's Ass'n*, 460 F.2d 497, 504-506 (CA4), *cert. denied*, 409 U.S. 1007 (1972) (upholding against government appeal the district court's refusal to order a change from use of permanent, previously segregated gangs to a daily shape-up system, because it was not necessary for a complete remedy and it would undermine defendants' interest in efficiency and safety).

IV. THE DECISION OF THE COURT OF APPEALS, SUBSTITUTING ITS JUDGMENT FOR THAT OF THE DISTRICT COURT, IS CONTRARY TO THIS COURT'S DECISIONS GOVERNING THE ALLOCATION OF AUTHORITY WITHIN THE FEDERAL COURT SYSTEM.

This Court has repeatedly held that the equitable power of the federal courts is primarily entrusted to the district courts. When a violation of Title VII is found, it is the district court in the first instance that has the responsibility of weighing the nature of the violation, the scope of its effects, the interests of the victims in being made whole, and the competing interests of other persons who may be harmed by relief that cures the violation. *Teamsters* v. *United States*, *supra*, 431 U.S. at 373-376; see also *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419-420 (1977). Resolution of these competing interests is entrusted "in the first instance to the sound equitable discretion of the trial court." *Teamsters* v. *United States*, *supra*, 431 U.S. at 376; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 779. The equitable balance struck by the district court is subject to review by the court of appeals, but it may not be reversed unless the underlying factual findings are clearly erroneous or the district court abused its discretion in "locat[ing] 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975).

In this case the district court discharged its obligation. In its initial decision the court found that the unlawful practice of dividing similar work between racially separate locals in the various Texas Gulf ports could be remedied by measures short of merging the local unions (48a-49a). The court of appeals reversed, holding that merger of "segregated locals" is mandatory "whenever they are shown to have had actual discriminatory effect

on employment opportunities" (36a-37a). On remand the district court was presented with the specific situation of Local 1576, and entered extensive findings, concluding that Local 1576 had never been a part of the violation, and that it had never discriminated against anyone; considering the effect that merger would have on the banana handlers and the Southern Stevedoring Co., the district court concluded that including them in merger would be unjust (14a-16a, 17a-20a). The court of appeals did not conclude that any of the district court's factual findings were clearly erroneous,[17] and it did not find that the district court had abused its discretion. The court of appeals merely adhered to its original insistence that merger is the only permissible remedy for "segregated" locals and that harm to members of Local 1576 did not justify denying that remedy (11a-12a).[18]

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[17] Without disturbing the district court's finding that Local 1576 had never discriminated against anyone, the court of appeals quoted a remark that the district court made in the course of the evidentiary hearings to the effect that he expected to find that Local 1576 referred Mexican-Americans for work in preference to blacks (10a). That remark did not purport to be a finding of fact, and it is apparent that the district court changed its view after receiving and considering all the evidence, because the formal findings of fact made pursuant to Rule 52, Federal Rules of Civil Procedure, were inconsistent with the earlier remark (16a, 20a).

[18] The court of appeals recognized that its own decisions supported merger as a remedy only when the existence of a "segregated" local is found to have an actual discriminatory impact on employment opportunities (9a-10a); *see Local 293, International Alliance of Theatrical Stage Employees* v. *Local 293-A, International Alliance of Theatrical Stage Employees*, 526 F.2d 316, 319 n.4 (CA5 1976). It is not clear on what basis the court of appeals believed that standard to have been satisfied in the case of Local 1576. The court of appeals called the local "functionally segregated," citing the evidence that its membership and those who work through its hiring hall are predominantly Mexican-American (9a-10a), and asserted that "Local 1576 has been part of a system that operates to discriminate against people because of race and national origin" (10a). This latter assertion was not supported by any record cita-

The effect of the court of appeals' order was to substitute its judgment for that of the district court, at the same time completely disregarding principles that govern the proper fashioning of such a remedy—in particular, this Court's admonition in *Teamsters* that harm to persons affected by a Title VII remedy *must* be considered in fashioning a remedy and can, in appropriate circumstances, justify a denial of equitable remedies that would otherwise be granted to victims of discrimination. 431 U.S. at 374-376.

The court of appeals' disregard in this case of the limitations on its power and of the allocation of functions between district courts and courts of appeals under Title VII is not an isolated aberration. In another case involving racially separate longshoremen's locals, in Baton Rouge, Louisiana, the Fifth Circuit reversed a

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tions, and it is inconsistent with the district court's findings, not disturbed on appeal, that Local 1576 was not part of the system that divided the same work within a single bargaining unit between racially separate unions and that Local 1576 had never discriminated. The court of appeals adverted to a finding by the district court that there had been a "tradition" in Galveston for longshoremen "historically" to work through the hiring hall of the local union identified with their own racial or ethnic group (16a). The district court did not find, however, that this "tradition"—which was shown to exist long before Local 1576 was chartered—was caused or encouraged by any actions of Local 1576, and the finding that Local 1576 never discriminated together with the dismissal of Local 1576 from the action reflect an implicit conclusion either that the "tradition" was not a violation of Title VII or that Local 1576 was not responsible for it.

If the intent of the court of appeals was to find, contrary to the district court's conclusion, that Local 1576 was somehow responsible for the discriminatory "system," it nonetheless erred in imposing the drastic remedy of merger without first giving the district court an opportunity to consider an appropriate remedy for that violation. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 376; *Dayton Board of Education*, *supra*, 433 U.S. at 419-420; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 435-436.

district court's finding of no violation and, instead of remanding for the district court to formulate an appropriate remedy, ordered merger of the local unions. *Bailey* v. *Ryan Stevedoring Co.*, 613 F.2d 588 (CA5 1980), petition for cert. pending *sub nom. Local 1830, General Longshore Workers* v. *Bailey* (No. 80-569). The Fifth Circuit has also disregarded the rules governing allocation of fact-finding responsibility between the district courts and courts of appeals, in at least two recent cases. In *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563 (CA5 1979), petition for cert. granted, No. 79-1764, 48 U.S.L.W. 3813 (June 17, 1980), the district court found that the termination of plaintiff was not based on sex; the court of appeals reversed, "disagree-[ing] with the trial court's findings," 608 F.2d at 567, and concluding that defendant's evidence of a nondiscriminatory reason for the termination was insufficient to rebut plaintiff's prima facie case, *id.* at 569. The court of appeals took this action based on its belief that it is entitled to make an independent evaluation of the factual question of discrimination rather than reviewing that question under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Id.* at 566. And in *Swint* v. *Pullman-Standard*, 624 F.2d 525 (CA5 1980), the Fifth Circuit applied the rule of *Burdine* to reverse the district court's conclusion that a seniority system was not established or maintained as the result of an intent to discriminate, without disturbing any of the district court's contrary findings of fact.[19]

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[19] Counsel for petitioner herein are also counsel for the United Steelworkers of America, a party in *Swint* v. *Pullman Standard*. A petition for writ of certiorari on behalf of the Steelworkers in that case is under preparation and will be filed January 15, 1981.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment of the court of appeals.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-3587

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
an unincorporated association, *et al.*,
Defendants,

I.L.A. LOCAL 1576,
Defendant-Appellee,

I.L.A. LOCAL 851,
Defendant-Appellant.

Aug. 13, 1980

Appeals from the United States District Court
for the Southern District of Texas

Before FAY, KRAVITCH and RANDALL, Circuit Judges.

FAY, Circuit Judge:

Appellants Equal Employment Opportunity Commission (E.E.O.C.), International Longshoremen's Association (I.L.A.) Local 851, and I.L.A. Local 307 seek re-

versal of a district court order excluding I.L.A. Local 1576 from the merger of the remaining I.L.A. deep sea locals[1] in Galveston, Texas. There are four deep sea locals in Galveston: Local 307 is composed of white longshoremen, Locals 329 and 851 are composed of black longshoremen, and Local 1576 has a predominantly Mexican-American membership. The district court ordered the merger of the white and black locals but excluded the Mexican-American local from the merger. Notwithstanding the earnest efforts and good intentions of then District Judge Garza,[2] the clear mandate of this court in *E.E.O.C.* v. *International Longshoremen's Association*, 511 F.2d 273, 280 (5th Cir.), *cert. denied*, 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975), requires us to reverse the order of the district court excluding Local 1576 from the merger and remand the case with directions that all four Galveston locals be merged.

I. *A Very Brief*[3] *History of the Case*

Over a decade ago the United States filed an action under Title VII of the Civil Rights Act of 1964,[4] alleging

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[1] The deep sea locals handle loading and unloading of deep sea vessels carrying cargo involved in foreign trade. *See* Supp. Record, vol. I at 810; Brief for Appellant E.E.O.C. at 2 n. 2.

[2] Now United States Circuit Judge.

[3] A detailed review by us of the facts of the case would be superfluous, since the prior decisions of this court and of the district court more than adequately chronicle the progress of the lawsuit. *See E.E.O.C.* v. *International Longshoremen's Ass'n*, 511 F.2d 273 (5th Cir.), *cert. denied*, 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975); *United States* v. *International Longshoremen's Ass'n*, 334 F.Supp. 976 (S.D. Tex. 1971).

[4] The suit was originally brought by the Attorney General under 42 U.S.C. § 2000e-6(a), which gave him jurisdiction when he had reasonable cause to believe that a person or group of persons were engaged in a pattern or practice of resistance to the enjoyment of any of the rights secured by the Act. Effective as of March, 1974, this jurisdiction was transferred to the Equal Employment Oppor-

that the International Longshoremen's Association (I.L.A.), the South Atlantic and Gulf Coast District of the I.L.A., and thirty-seven local general cargo longshoremen's unions chartered by the I.L.A., were engaged in a pattern or practice of discrimination on grounds of race, color, and national origin. The United States alleged that the defendants maintained local unions, hiring halls, and gangs which were classified and segregated on grounds of race and national origin, resulting in the denial of equal working opportunities to black and Mexican-American longshoremen. The relief sought included a court-ordered merger of the segregated locals, and the discontinuance of separate locals, hiring halls and gangs based upon race and national origin.

After hearing several days of testimony in the cause and reviewing the hundreds of exhibits filed, Judge Garza found

> that the Defendants have chartered and still maintain locals on a segregated basis, that the prevalent rule of dividing the work fifty-fifty between the White and Negro locals violates Title VII of the Civil Rights Act of 1964, because it deprives longshoremen, be they Black or White, Anglo, Mexican-American or Negro, equal working opportunities depending on which group is in the majority in the different ports, and that this will be a continuing violation in the future.

United States v. *International Longshoremen's Association*, 334 F.Supp. 976, 981 (S.D.Tex.1971). Despite his findings that the maintenance of segregated locals deprived on longshoremen of equal employment opportunities, Judge Garza refused to order the consolidation of

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tunity Commission by 42 U.S.C. § 2000e-6(c); § 2000e-6(d) continued without abatement all suits brought by the Attorney General by substituting the Commission as the party. *E.E.O.C.* v. *International Longshoremen's Ass'n*, 511 F.2d 273, 274 n. 3 (5th Cir. 1975).

the locals in each port. Rather, the court held that the violations of Title VII "can be fully corrected by the abolishment of separate hiring halls and the establishment of a common hiring hall" and by the adoption of common seniority classifications "on a port by port basis for each defendant local union which does the same kind of work . . . ." Interlocutory Decree, Supp. Record, vol. I, at 700-11. The E.E.O.C. appealed the court's refusal to merge the locals, and this court reversed, holding that "the edict of 42 U.S.C. § 2000e-2(c)(2) [Title VII] cannot be satisfied in the present case by measures short of the merger in each particular port of the racially segregated locals within that port." *E.E.O.C.* v. *International Longshoremen's Ass'n*, 511 F.2d 273, 280 (5th Cir.), *cert. denied*, 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975), (Thornberry and Godbold, JJ., specially concurring). The cause was remanded with directions to merge the I.L.A. locals within each Texas gulf port.

On remand, the district court conducted several evidentiary hearings for the sole purpose of determining whether I.L.A. Local 1576 should be required to merge with the other three deep sea locals in Galveston.[5] In a

[5] The record and briefs in the case indicate that the evidentiary hearings were held in response to a prior motion by the defendant locals to exclude Local 1576 from the interlocutory decree of the district court merging hiring halls and seniority plans but not the locals themselves. In support of their motion to exclude, the locals argued that Local 1576 had not been included with the others as a deep sea local in contracts with the West Gulf Maritime Association; that Local 1576 had not been covered by the joint welfare, vacation, and pension plans of the other locals; that Local 1576's charter limited its work to the loading and unloading of bananas and green fruit whereas the other locals were limited to loading and unloading general cargo; and that members of Local 1576 had less seniority than members of the other locals and would therefore be prejudiced by a merger. *See* Supp. Record, vol. I, at 700-01, 722-33; Brief for Appellant E.E.O.C. at 6-7. The interlocutory decree was reversed by this court, 511 F.2d 273, but the district court, on remand, continued to consider defendants' motion to exclude Local 1576.

Memorandum and Order dated October 1, 1979,[6] the district court examined the historical development, business activities, seniority systems, and employee benefit plans of the four locals in question.[7] The court next considered the three alternatives before it.

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[6] The unpublished Memorandum and Order appears in the Supp. Record, vol. I, at 809-17.

[7] The court found, *inter alia*, that

> [l]ocals 307, 329 and 851 are now and have always been operated as general deep sea locals. Local 1576 has never been affiliated with the general deep sea locals. Its work jurisdiction is more limited in that it is involved in the loading and unloading of bananas and green fruit. Locals 307, 329 and 851 have been and are now signatories to deep sea contracts between themselves and the South Atlantic and Gulf Coast District of the I.L.A. and the West Gulf Maritime Association. Local 1576 has never been a signatory nor been named in the Deep Sea Local contracts. Locals 307, 329 and 851 are also covered under a guaranteed annual income [GAI] plan with West Gulf Maritime Association. Local 1576 has never been and is not now covered under that plan, predominately because the work hour requirements of Local 1576 do not meet the minimum amount necessary to qualify under the GAI Plan. Locals 307, 329 and 851 have been covered in a welfare, vacation and pension plan in which Local 1576 has never been included.
>
> Local 1576 did not become an active local until the early 1960's, many years subsequent to the founding of the other three Galveston locals. Thus, the early 1960's was the starting point for Local 1576's seniority system. Additionally, although Locals 307, 329 and 851 have required at lease [*sic*] a minimum of 700 hours per year to obtain seniority, Local 1576 has never been able to demand such an amount. In the formative years of Local 1576's operation, business was extremely slow. In fact, there was a period in the early 1960's when Local 1576 had no business whatsoever. At first, a longshoreman could obtain seniority in Local 1576 if he loaded or unloaded one ship per year. That number was later raised to 20 ships per year and finally to the present requirement of 300 hours per year. Nonetheless, it was stated at the hearing that many of the 247 members of Local 1576 have worked more than 300 hours per

> First, the Court can merge the four locals together under a uniform seniority system. Second, it can order a merger excluding Local 1576 but requiring those members of Local 1576 who have dual seniority to choose between Locals 307 and 1576. This election would result in the elimination of the member's seniority in one of the locals. Third, the Court could order the merger excluding Local 1576 and allowing its members to retain their dual seniority.

Supp. Record, vol. I, at 813.

The court rejected the first alternative, the merger of all four locals, because the difference in the seniority systems of each local would place members of Local 1576 at the bottom of the seniority list. If the merged local were willing to grant a year's seniority to any longshoreman

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> year. Mr. Ramirez stated that Local 1576 maintains complete time records of all its employees.
>
> Although Local 1576 did experience a number of lean years, its members worked to develop and strengthen its position with regard to the banana and green fruit trade. The members of Local 1576 have built up a good reputation in their specialized business and have established themselves in the banana and green fruit market.
>
> It was also elicited at the hearing that a member of one local could seek work in another local and obtain seniority under the latter's system as well as his own. This procedure allows those longshoremen who cannot obtain work in their own local to go to another to earn their wages. Nonetheless, there has been a tradition in the Galveston locals that members of each race are expected to seek work only with the local whose membership is composed of that race.
>
> Traditionally, black longshoremen sought work in Locals 329 and 851. Members of the Anglo Local 307 would historically seek other work in Local 1576, and members of Local 1576 would in turn go to Local 307. Because of this, 43 members of Local 1576 have seniority in both their own local and Local 307.

Supp. Record, vol. I, at 811-12.

who had qualified in his own local and who had been available for longshore work, regardless of the hours actually worked, the first alternative would have been acceptable. Locals 307, 329 and 851 refused however, to accept this proposal, and because of this attitude, the court refused to merge all four locals. Supp. Record, vol. I, at 814.

The second alternative considered by the court was also rejected because of its discriminatory effect on Local 1576, leaving only the options of merging Locals 307, 329 and 851 while keeping Local 1576 separate. In support of this alternative, the court pointed out "that unlike the situation in the other locals, Local 1576 has not discriminated against any racial group. Although the great majority of members and work gang foremen are Mexican-American, its membership is open to anyone. There is no evidence that members of Local 1576 have ever discriminated against any individuals or refused admittance to their local." Supp. Record, vol. I, at 815. Finding the third alternative to be most equitable, the court ordered the merger of Locals 307, 329 and 851; Local 1576 was excluded from tne merger and removed as a defendant in the case. The E.E.O.C. and Locals 307 and 851 now appeal the order of merger excluding Local 1576. Relying on the law of the case set forth in this court's prior opinion, 511 F.2d 273, we reverse and remand the cause with directions to merge all four Galveston locals.

II. *The Law of the Case*

It is well established that a decision of a legal issue by an appellate court establishes "the law of the case" which must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to such issue, or (3) the prior decision was clearly erro-

neous and would work manifest injustice. *White* v. *Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967); *see Morrow* v. *Dillard*, 580 F.2d 1284, 1289-1290 (5th Cir. 1978); *Schwartz* v. *NMS Industries, Inc.*, 575 F.2d 553, 554-555 (5th Cir. 1978). The doctrine does not reach questions which were not decided in a former proceeding, but does comprehend "things *decided by necessary implication* as well as those decided explicitly." *Carpa, Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316, 1320 (5th Cir. 1978) (emphasis in original). Under the "law of the case" rule, the trial and appellate courts are bound by any findings of fact or conclusions of law made by the appellate court in a prior appeal of the case at issue. *De Tenorio* v. *Lightsey*, 589 F.2d 911, 917 (5th Cir.), *cert. denied*, 444 U.S. 831, 100 S.Ct. 59, 62 L.Ed.2d 39 (1979).

The district court here did not follow the law of the case as established by this court in the prior appeal. This court held that Title VII required "the merger in each particular port of the racially segregated locals within that port." 511 F.2d at 280. Judges Godbold and Thornberry, specially concurring, explained that such merger is required whenever the district court finds (as was done here) that segregated locals have caused unequal employment opportunity. *Id.* There is no question that this court's prior mandate comprehended the Galveston locals. The district court opinion singled out Galveston Locals 1576 and 329 as prime examples of locals whose members had been denied equal employment opportunity due to segregation. 334 F.Supp. at 980-81. Moreover, its interlocutory order requiring merger of hiring halls referred specifically to Galveston Locals 307, 329, 851, and 1576. *See* Interlocutory Decree, Supp. Record, vol. I, at 700-11. When this court reversed and remanded the case, holding that there was no discretion to refuse merger, it clearly contemplated that the four deep sea locals in Galveston would be merged. This message was clearly understood; on remand Judge Garza told counsel he would listen to arguments why Local 1576 should not be

merged, "but I just know that the Fifth Circuit is going to send it back to me." Supp. Record, vol. III, at 35. His prophecy is correct.

The district court failed to find an applicable exception to the law of the case doctrine to justify its deviation from this court's mandate. There is no contention that controlling authority since this court's 1975 decision dictates a contrary decision of the law applicable to this case; nor did the district court presume to hold that this court's decision was clearly erroneous. Further, the evidentiary hearings conducted since this court's ruling have not produced any new or substantially different evidence which would justify the exclusion of Local 1576 from the Galveston merger.

In view of this court's prior holding that segregated locals must be merged whenever they result in unequal employment opportunity, the only new evidence that could have justified excluding Local 1576 from the merger would have been evidence that the local is no longer segregated or that its segregated existence does not deprive any group of equal employment opportunity. The evidence demonstrated the contrary. Local 1576, still chartered as a union for Mexican-Americans, remains functionally segregated. *See, e.g.*, Record, vol. II, at 22-24, 41-44, 73. In 1971 the district court found that black longshoremen "have to be referred out of a [black] local hiring hall"; that "White longshoremen are referred out of a White longshoremen's hiring hall"; and that exceptions to this practice "have been few and far between." 334 F.Supp. at 978. *See also* 511 F.2d at 277 n.8. Based on evidence presented at the September 1979 hearing on remand, the district court specifically found that this practice has not changed: few black longshoremen obtain employment through either white Local 307 or Mexican-American Local 1576, and few white or Mexican-American longshoremen obtain employment through the black

locals (329 and 851). Referring to the tradition among the Galveston locals that members of each race are expected to seek work only with the local whose membership is composed of that race, the court commented:

> I don't doubt . . . at all that when there are some Blacks there in 1576 . . . the Mexican-Americans have the first crack at it. If I made any other findings, I would be a liar.

Record, vol. II, at 217. Although the trial court may have been correct in stating that Local 1576 never actively discriminated against members of any racial group, the fact remains that as one of four segregated Galveston longshoremen's locals, Local 1576 has been part of a system which operates to discriminate against people because of race and national origin. That Local 1576 may not have intended to discriminate does not justify its exclusion from the order of merger mandated by this court. *See* 511 F.2d at 278 (Title VII does not look to the intention of those who segregate). *See also International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

III. *The Struggle with Seniority*

A reading of the district court's October 1979 Memorandum and Order reveals that Local 1576 was excluded from the merger order primarily because the court believed a total merger would unfairly penalize members of Local 1576 by placing them at the bottom of the common seniority list. The loss of seniority, the court feared, would deny work to Local 1576 longshoremen, and thus deprive them of the "fruits of their labors." Supp. Record, vol. I, at 814. It was noted that this consequence could be prevented by slotting Local 1576 members into the merged system according to the seniority earned under that local's more lax standards. This alternative

was rejected, however, because of objections by the other locals.

In fact, the court's fear of disadvantaging Local 1576 may well have been unwarranted. While seniority in 1576 is determined on a different basis than it is for the other Galveston locals—Local 1576 has a 300 hour per year standard, the other locals a 700 hour per year standard—evidence in the record suggests that (1) in practice many Local 1576 longshoremen may be able to satisfy the higher standard, and (2) many black longshoremen may have less seniority than Local 1576 members regardless of the standard employed. *See, e.g.*, Record, vol. II, at 191-95, 214.

In any case, the prospect that blacks and whites may benefit at the expense of Mexican-Americans from the elimination of discrimination does not, in itself, justify permitting the discrimination to continue. As the district court recognized in 1971, "[w]hile the Civil Rights Act of 1964 was passed to aid Negroes and other minorities, it was passed to help Whites as much as Negroes, if their civil rights are being violated . . . ." 334 F.Supp. at 979. At that time the district court also noted the "terrific problem" of merging seniority lists. *Id.* at 981. However, in holding that a complete merger was required this court explicitly rejected the view that such problems justify the continued segregation of the locals. 511 F.2d at 280. The law is well settled that relief under Title VII cannot be denied simply because the interests of some employees will be negatively affected; otherwise "there will be little hope of correcting the wrongs to which the Act is directed." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 775, 96 S.Ct. 1251, 1269, 47 L.Ed.2d 444 (1976); *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236, 1238-39 (5th Cir. 1971). Rather, to eradicate the consequences of unlawful discrimination, the court "must be free to deal equitably with conflicting interests of . . . employees in

order to shape remedies that will most effectively protect and redress the rights of the . . . victims of discrimination." *Vogler* v. *McCarty, Inc.*, 451 F.2d at 1238-39. Under these principles, the finding by the district court that a merger of all four locals would disadvantage the Mexican-Americans of Local 1576 was not a sufficient reason to deny the merger.

IV. *Conclusion*

The outcome of this appeal is predetermined under the long-standing doctrine of law of the case. This court, in the prior appeal of this case, ordered that all four Galveston deep sea locals be merged. There have been no intervening changes in the law or the circumstances to justify any deviation from that command. We are compelled to once again remand with directions to merge all four Galveston locals. In so holding, we reaffirm the prior opinion of this court in *E.E.O.C.* v. *International Longshoremen's Ass'n*, 511 F.2d 273 (5th Cir.), *cert. denied*, 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975).

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

Civil Action Number 69-B-3

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association; SOUTH ATLANTIC AND GULF COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association; and LOCALS 1367, 1368 and 1372, I.L.A., Brownsville, Texas; LOCALS 872, 1231, 1271, 1273, 1330, 1331, 1525, and 1581, I.L.A., Houston, Texas; LOCALS 325, 1306 and 1610 I.L.A., Beaumont, Texas; LOCALS 307, 329, 851 and 1576, I.L.A., Galveston, Texas; LOCALS 1224, 1225, 1241, 1245, 1280 and 1281, I.L.A., Corpus Christi, Texas; LOCALS 1723 and 1818, I.L.A., Freeport, Texas; LOCALS 636, 991, 1405 and 1406, I.L.A., Texas City, Texas; LOCALS 440, 1029, and 1175, I.L.A., Port Arthur, Texas; LOCALS 341 and 814, I.L.A., Orange, Texas; and LOCALS 1758 and 1763, I.L.A., Port Lavaca, Texas, unincorporated associations,

Defendants.

MEMORANDUM AND ORDER

Pursuant to a decision of the Fifth Circuit Court of Appeals, *Equal Employment Opportunity Commission* v. *International Longshoremen's Association*, 511 F.2d 273

(5th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975), this Court is presently attempting to merge the I.L.A. Locals within each Gulf Port in the State of Texas so as to eradicate the racial discrimination which created the necessity for such merger. On September 19, 1979, this Court conducted an evidentiary hearing for the sole purpose of determining whether I.L.A. Deep Sea Local 1576 in Galveston, Texas, should be required to merge with the other Galveston Deep Sea Locals. The Court is of the opinion that it should not.

There are four deep sea locals in the Port of Galveston. A deep sea local is engaged in the loading and unloading of ships and materials in the gulf ports of Texas. Local 307 is composed of Anglo longshoremen. Locals 329 and 851 are composed of black longshoremen, and Local 1576 has a predominant membership of Mexican-Americans although it also includes Anglos and blacks. Locals 307, 329, 851 and the Plaintiff E.E.O.C. all desire a complete merger. Local 1576 does not.

At the September 19th hearing, five individuals testified. Three of them were members of Local 1576: Mr. Luis Sendejas, President, Mr. Bill Nelson, Business Agent and Mr. Baltazar Ramirez, Secretary. Mr. Leroy Hoskins, President of Local 851, and Mr. Andrew Lee Laws, President of Local 329, also testified. The following facts are taken from the foregoing individuals' testimony.

Locals 307, 329 and 851 are now and have always been operated as general deep sea locals. Local 1576 has never been affiliated with the general deep sea locals. Its work jurisdiction is more limited in that it is involved in the loading and unloading of bananas and green fruit. Locals 307, 329 and 851 have been and are now signatories to deep sea contracts between themselves and the South Atlantic and Gulf Coast District of the I.L.A. and the West Gulf Maritime Association. Local 1576 has never

been a signatory nor been named in the deep sea local contracts. Even though Local 1576 is not a party to any such collective bargaining agreements, it is covered under a pension, welfare and vacation benefit plan which is also available to Locals 307, 329 and 851. Since 1976, Local 1576 has received the same coverage as the other three locals under a guaranteed annual income program. This guaranteed annual income program entitles an employee who, because of the sparsity of jobs, is unable to work the base amount of 1,000 hours per year to receive a benefit which will equal his base plus his actual wages up to a certain annual hourly maximum.

Local 1576 did not become an active local until the early 1960's, many years subsequent to the founding of the other three Galveston locals. Thus, the early 1960's was the starting point for Local 1576's seniority system.[1]

Additionally, although Locals 307, 329 and 851 have required at least a minimum of 700 hours per year to obtain seniority, Local 1576 has never been able to demand such an amount. In the formative years of Local 1576's operation, business was extremely slow. In fact, there was a period in the early 1960's when Local 1576 had no business whatsoever. At first, a longshoreman could obtain seniority in Local 1576 if he loaded or unloaded one ship per year. That number was later raised to 20 ships per year and finally to the present require-

[1] In regard to Local 1576's seniority system, Mr. Nelson testified that the Plan of Seniority itself was determined differently in the other three locals. Mr. Nelson stated that while Locals 307, 329 and 851 accord seniority on progressive intervals of five years tenure, Local 1576 grants seniority on a year-by-year basis. Under the first system, in, for example, the five to ten year category, a longshoreman who has six years experience is equal to one with nine years experience and, according to the wishes of his foreman, could be selected over his more experienced colleague. Under Local 1576's system, the longshoreman with nine years experience would be chosen first for a job on the waterfront.

ment of 300 hours per year. Nonetheless, it was stated at the hearing that many of the 247 members of Local 1576 have worked more than 300 hours per year. Mr. Ramirez stated that Local 1576 maintains complete time records of all its employees.

Although Local 1576 did experience a number of lean years, its members worked to develop and strengthen its position with regard to the banana and green fruit trade. The members of Local 1576 have built up a good reputation in their specialized business and have established themselves in the banana and green fruit market.

It was also elicited at the hearing that a member of one local could seek work in another local and obtain seniority under the latter's system as well as his own. This procedure allows those longshoremen who cannot obtain work in their own local to go to another to earn their wages. Nonetheless, there has been a tradition in the Galveston locals that members of each race are expected to seek work only with the local whose membership is composed of that race. Traditionally, black longshoremen sought work in Locals 329 and 851. Members of the Anglo Local 307 would historically seek other work in Local 1576, and members of Local 1576 would in turn go to Local 307. Because of this, 43 members of Local 1576 have seniority in both their own local and Local 307. Even though Local 1576 is predominantly Mexican-American, the evidence shows that it never discriminated against members of any racial group. Local 1576 is composed of Anglos, blacks and Mexican-Americans. Local 1576 possesses 16 work gangs through which the members earn their hours. There are 15 Mexican-American foremen and one Anglo foreman. Although there are no black foremen at the present time, there has been one in the past. Additionally, Local 1576 has advertised on the radio in an effort to obtain additional longshoremen. These advertisements were in both Eng-

lish and Spanish on Galveston Station KGBC. They were usually placed on weekends which tend to be the busiest time since two ships might arrive simultaneously. Local Local 1576 ceased the advertising, largely because the cost became excessive.

Locals 307, 329 and 851 now seek a merger which will include Local 1576. This stance taken by the three locals signifies a 180 degree shift from their previous position. On December 26, 1973, Locals 307, 329 and 851 joined in a Motion to Exclude Local 1576.[2] The Motion was based largely upon the fact that the work jurisdiction of Local 1576 was separate and distinct from that of the other Galveston locals. More recently, the Court was informed by letter that a plan of merger in the Galveston ports which excluded Local 1576 was ready although it was never presented to the Court. Now, because of "changed circumstances," the three locals desire a total merger. The "changed circumstances" were never delineated by the locals seeking the merger. The membership of Local 1576 is unanimously in favor of remaining separate. The membership is also fully cognizant that their lifeline of employment is a slender one. A banana crop wiped out by a hurricane or a decision by the banana industry to pull out of Galveston would destroy Local 1576. The membership is completely aware of such possibilities and assumes the inevitable risks.

Therefore, the Court is faced with three alternatives. First, the Court can merge the four locals together under a uniform seniority system. Second, it can order a merger excluding Local 1576 but requiring those members of Local 1576 who have dual seniority to choose between Locals 307 and 1576. This election would result in the elimination of the member's senority in one of the

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[2] Besides the three locals abovementioned, the International Longshoremen's Association and the South Atlantic and Gulf Coast District of the I.L.A. also joined in the motion to exclude Local 1576.

locals. Third, the Court could order the merger excluding Local 1576 and allowing its members to retain their dual seniority.

Under the first alternative, supported by Locals 307, 329 and 851, it is apparent that members of Local 1576 would be penalized and might well find themselves out of a job. Although the average number of years that members have been employed in each of the four locals might be similar, the difference in the seniority systems would place members of Local 1576 at the bottom of the seniority list. If the merged local would grant a year's seniority to any longshoreman who had qualified in his own local and who had been available for longshore work, regardless of the hours actually worked, the first alternative would be acceptable. Locals 307, 329 and 851, however, refuse to agree to such a proposition. Mr. Hoskins testified that he will not agree to give a year's seniority to a longshoreman who has not worked the minimum number of hours required in his union even if that man qualified in Local 1576.[3] Mr. Laws also stated that he would not agree to such a situation. Because of this attitude, the Court will refuse to merge all four locals.

Local 1576 has been treated as a stepchild in the Port of Galveston since its inception. It has endured rugged and trying years when work was slim. Even when the work increased, members of Local 1576 did not become part of the deep sea contracts. The other Galveston locals have not, until now, wanted anything to do with Local 1576 because of the latter's specialized duties. If merger is now allowed, Local 1576 mem-

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[3] At the hearing, counsel for Local 851, Mr. Robert Moore, stated that his client would agree to grant a year's seniority to any member of Local 1576 who qualified for a year's service in the latter union. Nonetheless, it was apparent that Mr. Hoskins did not agree with his attorney's stipulation. In light of such a conflict, the Court must assume that the union would not agree to accepting Local 1576 members on the same basis as its own members.

bers will find themselves at the bottom of the seniority list, and the other local members will be selected for the banana and green fruit work. Such a situation deprives the Local 1576 members of the fruits of their labors which they have cultivated for many years. There is a possibility also that with the disappearance of Local 1576 members from the banana trade, the banana industry might decide to take their business to a different port. This Court will not now countenance a decision which would give Locals 307, 329 and 851, without any claim of seniority in Local 1576, the benefits earned by Local 1576.

The second alternative is equally favored by the three locals. The three locals argue that allowing Local 1576 to remain separate and keep the dual seniority results in the denial of work to members of the merged local. Members of the three locals contend that if the dual seniority is retained, members of Local 1576 will be able to work their usual four day work week and then, by taking advantage of their dual seniority, seek work in Local 307 on weekends and holidays. The three locals contend that this would allow Local 1576 members to work a six or seven day week and deprive Local 307 members of work in their own union. The Court refuses to accept this alternative as well. The 43 members of Local 1576 who have dual seniority have made themselves available for work in Local 307 and have acquired legitimate seniority in that local. To require those longshoremen to choose between the two locals and renounce their seniority in one of them is inequitable and unfounded. The Court's reasoning is strengthened by the fact that members of locals in other ports could and probably do possess seniority in Galveston locals. The three locals apparently do not object to the latter practice. The Court sees no reason to discriminate against members of Local 1576 while allowing members from outside ports to retain any dual seniority which they might have.

It is also clear to the Court that unlike the situation in the other locals, Local 1576 has not discriminated against any racial group. Although the great majority of members and work gang foremen are Mexican-American, its membership is open to anyone. There is no evidence that members of Local 1576 have ever discriminated against any individuals or refused admittance to their local. Therefore the Court is of the opinion that the most equitable decision is to proceed with the merger of Locals 307, 329 and 851. Local 1576 shall be excluded from the merger, and it shall continue to conduct its present business. Additionally, all members of Local 1576 who possess dual seniority shall be allowed to retain it.

It is hereby ORDERED that the merger of Locals 307, 329 and 851 in the Galveston port shall proceed with all haste.

It is further ORDERED that Local 1576 shall be excluded from the merger and shall be removed as a Defendant in the above styled case.

The Clerk shall send a copy of this Memorandum and Order to all counsel, and the master, Dean A. A. White.

DONE at Brownsville, Texas, on this the 1st day of October, 1979.

/s/ Reynaldo G. Garza
REYNALDO G. GARZA
United States Circuit Judge

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS
Clerk

By /s/ B. Barbour
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Civil Action Number 69-B-3

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Defendants.

PARTIAL JUDGMENT

By a Memorandum and Order entered this date, the Court ordered that Galveston I.L.A. Local 1576 would be excluded from the merger of Galveston I.L.A. Locals 307, 329 and 851. Based upon that Memorandum and Order, it is hereby

ORDERED, ADJUDGED and DECREED that Galveston I.L.A. Local 1576 is removed as a defendant from the abovestyled cause. The Clerk shall remove said defendant from the docket of this Court.

Although there are still a number of parties and claims involved in this case, pursuant to FED. R. CIV. P. 54(b), the Court is of the opinion that there is no just reason for delay on this issue, and, therefore, final judgment shall be entered dismissing Local 1576 from this action.

The Clerk shall send a copy of this Partial Judgment to all counsel, and the master, Dean A. A. White.

DONE at Brownsville, Texas on this the 1st day of October, 1979.

/s/ Reynaldo G. Garza
REYNALDO G. GARZA
United States Circuit Judge

APPENDIX C

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1975

December 1, 1975

No. 75-356. INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C.A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 273.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1053

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Defendants-Appellees.

April 11, 1975

Appeal from the United States District Court
for the Southern District of Texas

Before THORNBERRY, GOLDBERG and GODBOLD, Circuit Judges.

GOLDBERG, Circuit Judge:

This suit poses for us, in the year 1975, the question of the legality of maintaining segregated black and white unions. Workers in these unions perform the same basic functions, for the same bosses, in the same ports but do so out of different locals. Defendants claim that this division is no more than an amenity for those who wish to associate with "their own". We believe that the effect, if not the intention, is far more invidious, in that it denies equal opportunities to workers and potential workers, and is thus in violation of 42 U.S.C. § 2000e et seq.

The defendants in this suit are the International Longshoremen's Association, the South Atlantic and Gulf Coast District of the Association and 37 local unions within the State of Texas which are chartered by the Association. Save for one of the locals, all, whether black

or white, are opposed to a merger with their "sister" unions within each port.[1]

All of the locals involved in this suit were chartered before the passage of Title VII, the Civil Rights Act of 1964.[2] The unions have had what was admittedly a progressive interracial arrangement when the unions were first chartered. In most of the ports the work was divided on a 50%-50% basis between the black and white locals. There were no wage differentials between those in the white and those in the black locals. The defendants contend, and the plaintiff, the Equal Employment Opportunity Commission, does not dispute, that the union committee, which bargains with the shippers for the labor agreements which control the Texas ports, is made up equally of black and white members. Finally, while in some of the ports the mean take home pay for a white longshoreman is higher than that for a black longshoreman, this is at least in part a function of the fact that black locals have chosen in their own discretion to confer seniority and therefore job eligibility on more men by employing laxer standards.

Nonetheless, the United States in 1969 brought suit,[3] claiming that what was progressive many years ago has become, because of the march of law, illegal now.

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[1] Local 1368, in Brownsville, Texas is made up mostly of blacks with some Mexican-Americans. Brownsville appears to be a special case, in which this union local receives only 25% of the work. It appeals for a "fair share" for its members by whatever means necessary and does not necessarily oppose merger of locals.

[2] 42 U.S.C. § 2000e et seq.

[3] The suit was originally brought by the Attorney General under 42 U.S.C. § 2000e-6(a), which gave him jurisdiction when he had reasonable cause to believe that a person or group of persons were engaged in a pattern or practice of resistance to the enjoyment of any of the rights secured by the Act. Effective as of March, 1974, this jurisdiction was transferred to the Equal Employment Opportunity Commission by 42 U.S.C. § 2000e-6(c); § 2000e-6(d) continued without abatement all suits brought by the Attorney General by substituting the Commission as the party.

I

FACTS

The Government's suit claimed that the pattern of union organization violated 42 U.S.C. § 2000e-2(c)(2), which says that it will be an unlawful employment practice for any labor organization:

> [T]o limit, segregate, or classify its membership or applicants for membership or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities . . . or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin.

The plaintiff asked the district court to hold that segregated unions are, per se, a violation of the statute and therefore to order that the paired local unions be merged. The defendants essentially argued that no economic deprivation resulted from the existence of separate locals and therefore that their organizational structure did not violate the law.

In his opinion, United States v. Int'l Longshoremen's Ass'n, S.D.Tex.1971, 334 F.Supp. 976, the district judge found that the maintenance of completely separate unions would, in fact, tend to deprive individuals of employment on the basis of their race. Judge Garza decided that while the 50%-50% rule had the superficial look of equality, in fact it had discriminatory potential:

> If in any port there are one hundred Whites available to work on the waterfront as longshoremen and two hundred Negroes, and the work is divided fifty-fifty it is obvious that the one hundred Whites will work more hours than the Negroes. . . .

> It is not the racial composition of the community that should control, but the number of Blacks and Whites that make themselves available for longshore work that counts.

334 F.Supp. at 979. However, he declined to find that segregated unions in themselves were in violation of the Civil Rights Act of 1964 and stated that he thought he could shape a decree short of merger which would remedy the economic deprivation. He held the formulation of a decree in abeyance, however, and certified to this Court, under 28 U.S.C. § 1292(b), the question of whether the segregated locals had to be merged.[4]

For reasons known only to it, or perhaps for no reason at all, the plaintiff did not take an appeal but decided instead to enter into negotiations with the unions, still, apparently, maintaining its "merge or no deal" approach throughout. This approach did not result in a resolution of the issues, and on November 6, 1972, a year after Judge Garza entered his first order, the Government made a motion for entry of judgment. In its Memorandum in Support of Plaintiff's Motion for Entry of Judgment, the Government said: "We believe that an Order should be entered requiring merger in the manner suggested by our Proposed Decree, and also requiring the other elements of relief contained in that proposal." A year after this motion on October 1, 1973, the district

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[4] 28 U.S.C. § 1292(b) reads, in relevant part:

> When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . .

court entered an Interlocutory Decree which held that the defendants were not required to merge and that "therefore such relief is hereby denied;" and proceeded to hold that the violations of Title VII of the Civil Rights Act of 1964 "can be fully corrected by the abolishment of separate hiring halls and the establishment of a common hiring hall" and by the establishment of common seniority classifications. The Equal Employment Opportunity Commission appeals from this Interlocutory Order.

II

JURISDICTION

A panel of this Court denied appellee's motion to dismiss the appeal on February 12, 1974. We agree with that panel's action and believe that the appeal is correctly before this Court.[5] The jurisdictional posture of this case is a peculiar one. The district court's order is definitely interlocutory in nature. It orders the parties to confer in establishing common seniority systems and hiring halls and to submit a plan back to the district court so that it can entertain objections. The order goes on to state that the district court is retaining jurisdiction in

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[5] Indeed, it might appear that once a panel of this Court had made a legal determination that jurisdiction exists, no subsequent panel on its own could make a contrary determination. Rather the original panel's action would appear, at the least, the law of the case, and could not be overruled except by this Court sitting en banc. Nonetheless, this Court has held that the panel deciding the case must make a de novo determination of jurisdiction. We have said: "Although motions to dismiss have been denied under our administrative procedures, the Court of Appeals is not precluded from a further inquiry as to its jurisdiction and is not relieved of the duty to dismiss the appeal if it appears there is no jurisdiction." Austracan, Inc. v. M/V Lemoncore, 5 Cir. 1974, 500 F.2d 237 at 239; *see also* Cook v. Eizenman, 5 Cir. 1963, 312 F.2d 134 at 136. Thus we must make the independent inquiry above.

the matter with "full power and authority to issue any additional Orders necessary to insure equal employment opportunities . . . ." In so ordering, however, the judge denied the plaintiff's motion for a permanent injunction merging the locals.

28 U.S.C. § 1292(a)(1) provides in relevant part that the courts of appeals shall have jurisdiction of appeals from "interlocutory orders of the district courts of the United States, . . . granting(,) . . . refusing or dissolving injunctions . . ." In a number of cases we have upheld the appealability of denials of preliminary injunctions. *See, e.g.*, Mercury Motor Express, Inc. v. Brinke, 5 Cir. 1973, 475 F.2d 1086; Southeastern Promotions, Ltd. v. City of Mobile, 5 Cir. 1972, 457, F.2d 340; Smith v. Grady, 5 Cir. 1969, 411 F.2d 181; Dilworth v. Riner, 5 Cir. 1965, 343 F.2d 226; Bd. of Pub. Instr. v. Braxton, 5 Cir. 1964, 326 F.2d 616.

The only jurisdictional question in the present case is whether § 1292(a)(1) applies to give us jurisdiction of denials of permanent injunctions. We conclude that it does. In Ferrara v. Louisiana, 5 Cir. 1971, 443 F.2d 344, while recognizing our lack of jurisdiction we said ". . . [W]e concede that the denial of a preliminary or permanent injunction is appealable, . . ." and go on to decide the case by noting "But the critical fact is that plaintiffs in the proceedings on defendants' motions to dismiss merely opposed those motions and did not ask for a preliminary injunction, much less a permanent one." 443 F.2d at 345, 346. Though dicta, *Ferrara's* language traces the correct path.

First, we note that in granting the jurisdiction to hear an appeal from the denial of an injunction, the statute draws no distinction based upon the type of injunction which a party has requested. Second, to the extent that jurisdiction over only certain interlocutory orders—those involving injunctions—has been granted in furtherance of the general policy against piecemeal

appeals, *see* Andrews v. United States, 1963, 373 U.S. 334, 83 S.Ct. 1236, 10 L.Ed.2d 383, that purpose is as well, or better served, in the adjudication of motion for a permanent rather than a preliminary injunction. In many cases issues will be finally resolved by the grant or denial of a permanent injunction, while no such resolution will stem from a decision on a motion for a preliminary injunction. This will be the case when, as in the present situation, the question of the appropriate remedy is itself a matter of law. Finally, the factor which singles out injunctions as those matters which will be appealable from an interlocutory order, the potential for irrecompensible injury, Di Bella v. United States, 1962, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614; Baltimore Contractors, Inc. v. Bodinger, 1955, 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233, is just as likely to be present when an injunction is denied or granted for a time period extending beyond the final order in the trial. These considerations compel the conclusion that the appeal at bar is properly before us.[6]

III

MERITS

In United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, we gave comprehensive attention to the evidentiary issues surrounding a showing of discrimination. That opinion dealt in part with the interpreta-

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[6] We note that dicta in the Supreme Court's opinion in Switzerland Cheese Ass'n v. Horne's Mkt., 1966, 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed.2d 23, is consistent with our conclusion. The Court said: "We take the other view [that the petitioner could not appeal] not because 'interlocutory' or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25, 87 S.Ct. at 195, 17 L.Ed.2d at 25.

tion of section 2000e-2(c)(2), noting that "there appears no valid justification for preservation of these locals as separate entities. The record clearly discloses that the existence of 'separate but equal' locals has had, and may continue to have, post-Act deleterious effects on blacks." 451 F.2d at 457. We ordered the merger of segregated unions, but in doing so did not need to inquire further into the meaning of the statute before us.[7]

Reading § 2000e-2(c)(2) by its literal terms, as we ordinarily do, Perry v. Commerce Loan Co., 1966, 383 U.S. 392, 400, 86 S.Ct. 852, 857, 15 L.Ed.2d 827, 833; Mumford v. Glover, 5 Cir. 1974, 503 F.2d 878 at 882, I believe that the statute puts an extremely heavy burden on those who wish to maintain segregated unions. They must show that this organizational structure would not *tend* to deprive any *individual* of employment *opportunities* or affect his status as an employee.

I conclude that the unions cannot make such a showing, even granting that present longshoremen, whether black or white, are paid the same wages, have equal numbers of representatives on the contract negotiating committee, and, under a common seniority and hiring hall system, could be assured of an equal chance of obtaining longshore work. There are two reasons for this decision. First, black individuals who might potentially seek employment opportunities as longshoremen would tend to be dissuaded by the onus they would then have to bear of working through an involuntarily all-black organization.[8]

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[7] The Court was not presented with motions for remedies short of merger and did not directly deal with the validity of such remedies.

[8] The defendants note that there is no requirement within the rules which govern the locals that each local may service only members of its predominant race. But they admit that the locals were chartered on the basis of race, and have been maintained on that basis. As the district court found, the exceptions to this pat-

Second, there is a significant likelihood that the contracts which would emerge from bargaining sessions in which all of labor's representatives were charged with serving all of the employees would better the employment status of present and potential black employees than does a bargaining committee in which half of the representatives are charged with serving white employees and the other half with serving black employees.

A. *Stigma*

In Brown v. Board of Educ., 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, in which the Supreme Court held that segregated schools denied to blacks the equal protection guaranteed by the Fourteenth Amendment, the Court said: "To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494, 74 S.Ct. at 691, 98 L.Ed. at 880. The Court then quoted from the lower court in one of the cases consolidated in *Brown:* "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." *Id.* The Supreme Court found that regardless of the equality of the material inputs, segregated schools could not be equal because the very segregation causes psychic trauma to the black children.

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tern "have been few and far between". 334 F.Supp. at 978. They are functionally segregated; neither this Court nor the statute we are applying would force blacks to undergo the tension and tribulations of joining the predominantly white local before we decide the case.

The racial stigma which prevents segregated schools from offering equal educational opportunities is not felt exclusively by children, nor is it felt exclusively in the educational context. The Supreme Court subsequently summarily decided a series of cases in which it held that racially separate facilities were inherently unconstitutional; the Court came to those decisions without regard to any evidence of material equality. See, e.g., New Orleans City Park Improvement Ass'n v. Detiege, 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46, aff'g 5 Cir. 1958, 252 F.2d 122 (segregated parks). Gayle v. Browder, 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, aff'g Browder v. Gayle, M.D. Ala. 1956, 142 F.Supp. 707 (segregated sectioning of buses); Mayor and City Council of Baltimore v. Dawson, 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774, aff'g Dawson v. Mayor and City Council of Baltimore, 4 Cir. 1955, 220 F.2d 386 (segregated beaches).

We must address ourselves to the terms of § 2000e-2(c)(2) in light of this judicial recognition of the harm to self-esteem that attaches to many black persons at the prospect of obtaining their goal through an involuntarily segregated mechanism—whether that goal be educational, transportation, recreation or, in the present case, employment. Once we do so it becomes apparent to me why the segregated locals currently before us must be merged. The statute says that any segregation which tends to deprive an individual of employment opportunities is illegal. Many black people who are about to embark upon a career will be dissuaded from becoming longshoremen because of the extra burden which attaches to that profession in the form of the psychic discomfort of segregation. That extra obstacle, in other words, tends to deprive them of their opportunity to become longshoremen. It does not matter that many of the blacks currently in the segregated local have come to regard it as a voice of the black community. The effect of such seg-

regation is likely to be viewed as a negative one by many blacks considering potential jobs and so long as one black so views it, the result of the practice is discrimination. Nor does it matter that those who continue the system may not have a discriminatory intent. The statute which we are construing calls for a finding of illegitimacy where the classification tends to effect a denigration of employment opportunities. It does not look to the intention of those who segregate nor to the satisfaction with which they may view the job they have done.

B. *Negotiations*

The other detriment which blacks will tend to suffer relates to the adverse effect upon their employment status and employment opportunities of the contractual terms which emerge from bargaining sessions in which only some of labor's negotiators are charged with representing their point of view. The problem is well expressed in an analogous case to the present one, faced by the Fourth Circuit:

> Abolition of the dual hiring halls and the other reforms decreed by the district court do not eliminate the necessity of merging the locals. The ILA's failure to secure equal employment opportunities for its black members in all jobs for which they are qualified is an example of the inherent inequality that the district judge correctly concluded can be remedied only by merger. Apart from further litigation, discrimination against black workers who aspire to non-gang jobs, such as gearmen, mechanics, and foremen, can only be accomplished by bargaining with the stevedores. But the officers of the white local owe no duty to the members of the black local, and it is unrealistic to expect them to participate in hard bargaining on behalf of black longshoremen. . . . At best, the union's committee ap-

> proaches the bargaining table with divided legal responsibilities and loyalties. However, merger of the locals will place on all bargaining representatives, not just black bargaining representatives, the statutory duty to eliminate racial discrimination throughout the Port. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 203, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

United States v. Int'l Longshoremen's Ass'n, 4 Cir. 1972, 460 F.2d 497 at 501. This reasoning is as relevant in our case as it was in the case before the Fourth Circuit. As Judge Garza noted below:

> Much of this disparity [in total earnings by locals] is due to the earnings of individual workers on the waterfront who are members of the locals, but who are hired directly by the employers, and who are not referred by the locals, most of whom are Whites, such as the so-called Gearmen. This situation has been known for a long time, and yet the contracts entered into by and between the industry and the longshoremen have not attempted to correct this situation.

334 F.Supp. at 979.

I believe that this type of discrimination is more likely to be overcome when all of labor's negotiators have the statutory duty to oppose it, as compared to the case when only some will oppose it and others will be willing, at least, to tolerate the discrimination in return for other types of benefits.[9]

Moreover, merger eliminates the possibility of internecine strife between the segregated unions either in

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[9] In addition, there are, of course, multifarious aspects of the contract negotiation process whose resolution may differentially affect a black employee's status depending on the duties and directions of the negotiators.

the negotiation process or in other phases of union activity. For, where different unions have different interests we cannot be assured of continuing amicable relations. I read another salutary effect of this construction of the statute to be the prevention of any such interunion carnage under black and white flags.

IV

CONCLUSION

Plessy v. Ferguson, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, with all of its "separate but equal" paraphernalia has failed the constitutional test of time for a good reason. The involuntary separation of people engenders a psychological harm which puts the lie to contentions of equality. It is ludicrous to say in the seventh decade of the twentieth century, 20 years after Brown v. Board of Education gave us our forceful education in race relations, as our society and courts have struggled with the great task of cleansing the vicious inequities which have beset our black citizens, that segregated unionism is to receive the statutory or constitutional blessing of our Congress or this Court. Congress would be shocked to hear that their legislation entrenches the inequality *inherent* in segregated locals. And I would not undue twenty years of judicial travail to allow that same result. Unions are not entitled to any separate enclave in our legal and sociological stratification. A union is not a social club; it is a fundamental economic instrument in our society and we have a whole body of law regulating it. The statute we have under consideration is addressed to the potential employment of every citizen as well as to post-employment conditions. The segregated unions that we have before us, by their very nature, deny equal employment opportunities and conditions because of the psychological harm they inflict. This

is an intolerable situation. Congress designed the statute we have before us to abrogate racism and does not allow us to sanctify segregated unions when they perpetuate unequal effects. It may cost some money to merge these unions; there may be some disruption in activities, but I would not ever condemn black workers to the Hobson's choice of living in an involuntarily black niche or foregoing employment opportunities on the waterfront.

I must conclude, then, that the district court erred when it refused to grant plaintiffs' motion for the entry of a permanent injunction against the continued operation of segregated locals. I find that the edict of 42 U.S.C. § 2000e-2(c)(2) cannot be satisfied in the present case by measures short of the merger in each particular port of the racially segregated locals within that port. On that basis I would reverse and remand this case.

Reversed and remanded.

THORNBERRY, Circuit Judge, with whom GODBOLD, Circuit Judge, joins (specially concurring):

We concur in the court's judgment, and in Parts I and II of Judge Goldberg's opinion. In our view, however, the merits of this case can be decided without holding that segregated locals constitute a per se violation of Title VII. As Judge Goldberg notes, p. 275, *ante*, the lower court here specifically found that "the Government has discharged . . . [its] burden . . . [of showing] that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin." 334 F. Supp. at 980.* In United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418 this court wrote:

> The record clearly discloses that the existence of 'separate but equal' locals has had, and may con-

> tinue to have, post-Act deleterious effects on blacks . . . We conclude that the District Court erred in refusing to hold that the failure to consolidate the locals violates section 703(c) of the Act, 42 U.S.C.A. § 2000e-2(c).

451 F.2d at 457. We read this language to make merger of segregated locals mandatory whenever they are shown to have had actual discriminatory effect on employment opportunities. Since in this case Judge Garza found that employment discrimination resulted from the existence of segregated locals, *Jacksonville Terminal* left him no discretion to refuse merger. Hence, the order on appeal must be reversed. If a case ever comes to us with a finding by the district court that no actual employment discrimination arose from segregated locals, we may then properly consider the necessity for a rule of per se illegality. On this basis we join the court's judgment.

APPENDIX E

UNITED STATES DISTRICT COURT
S. D. TEXAS
BROWNSVILLE DIVISION

Civ. A. No. 69-B-3

UNITED STATES OF AMERICA, BY JOHN N. MITCHELL, ATTORNEY GENERAL,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association, *et al.*,

Defendants.

Nov. 12, 1971

MEMORANDUM

GARZA, District Judge.

On January 20, 1969, in which was probably the last case filed by the Johnson administration, then Attorney General Ramsey Clark filed the above suit under Title VII of the Civil Rights Act of 1964, alleging a pattern or practice of discrimination on grounds of race, color and national origin, in violation of said Act. The Defendants included the International Longshoremen's Association (hereinafter called the I.L.A.), the South Atlantic and Gulf Coast District of the I.L.A. (hereinafter referred to as District), and thirty-seven local general cargo longshoremen's unions chartered by the I.L.A., all of whom are labor organizations within the meaning of 42 U.S.C. § 2000e(d), and all of whom are engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000e(e). As has been stated, the United States has alleged that the Defendant unions have en-

gaged in a pattern or practice of discrimination on the grounds of race and national origin, more particularly that the Defendants have maintained local unions, hiring halls and gangs, which were classified and segregated on the grounds of race and national origin, and that this has resulted in the denying of equal working opportunities to Negro and Mexican-American longshoremen, because of their race or national origin, and that the District, in its contract negotiations with employers, has caused such employers to also discriminate on the grounds of race and national origin. The United States asks this Court to order a merger of the segregated locals, and the discontinuance of separate locals, hiring halls and gangs based upon race and national origin, and for such further steps as would be necessary and proper.

With the exception of two Negro locals, one in Galveston and one in Brownsville, both with special problems that will be referred to further on in this opinion, all Defendants are opposed to the merger of locals that the Government proposes, and deny any violation of the Civil Rights Act of 1964.

It took some time to serve all Defendants and for answers to be filed, and with the exception of a few depositions and communications between the United States and some of the attorneys for the Defendants, very little was done in preparation for the trial of this case, until this Court, on May 12, 1970, set a pretrial in this cause to be held in Houston, Texas, on Tuesday, June 23rd, and the trial of the same was set for Houston, as a place within this District convenient to counsel and witnesses, for July 13, 1970.

In preparation for trial, the depositions of officials of every one of the Defendants were taken.

At the pre-trial on June 23, 1970, the parties agreed to stipulate to as many facts as possible to shorten the

time of trial. This was done and an extensive stipulation was filed by the parties, which has been very helpful to the Court.

At the pre-trial, the Defendants urged this Court to dismiss the cause of action on the grounds that the attempt by the United States to merge the local longshoremen's unions was a violation of their constitutional right of association under the First Amendment. The Court took the motion to dismiss on these grounds under consideration, and said it would carry it along with the case. The motion to dismiss on these grounds is now denied.

The Court heard testimony in this cause from July 13th through July 17, 1970, and from September 9th to September 17, 1970. During the trial, hundreds of exhibits, some of them rather bulky, were received in evidence, and the Court has had to read the same and assimilate their contents. The parties, at the conclusion of the trial, were allowed to file briefs, and a schedule was set up, which, at the request of counsel, had to be extended. In the meantime, some of the Defendants asked to reopen the record for the filing of additional exhibits, all of which requests were granted.

The Defendants in this cause of action represent longshoremen and warehousemen who load and unload ships at warehouses in ports along the Texas Gulf Coast, at Orange, Beaumont, Port Arthur, Galveston, Texas City, Houston, Freeport, Port Lavaca, Corpus Christi and Brownsville. The membership of each local union in these ports is totally segregated on the basis of race or national origin. Of the thirty-seven local unions which are party Defendants, sixteen locals were for White longshoremen and have no Negro members, and nineteen were for Negro longshoremen and have no White members, and two locals are composed predominantly of Mexican-American longshoremen.

Because of the Texas Right-to-Work Law, all the locals service and refer many non-members. In fact, it was surprising to find that many, many of the longshoremen are not union members, but they work through the local union hiring halls. Under the contracts with the employers, the union gets a certain amount from the employer for every longshoreman, be he union member or not, some of this money going to the pension and welfare funds, and the balance to the coffers of the unions, and even non-union members are entitled to attain seniority as longshoremen and to participate in their pension and welfare plans.

While attempts were made to prove to this Court that a Negro could apply for membership in a White local and vice versa, it is obvious that a Negro does not apply to a White local, and a White does not apply to a Negro local for membership. Negro longshoremen have to be referred out of a Negro local hiring hall, and White longshoremen are referred out of a White longshoremen's hiring hall. While there may have been exceptions in the past, they have been few and far between. The evidence shows that some coastwise general cargo locals have been merged with some deep sea general cargo locals in their respective ports. The Negro coastwise general cargo locals have been merged with Negro deep-sea general cargo locals, and the White coastwise general cargo locals have been merged with White deep-sea general cargo locals, this happening since the filing of this action.

It has been stipulated that the I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their merger, or to charter integrated locals since the passage of the Civil Rights Act.

Negro union officials who testified before the Court have urged the Court not to order a merger. They say

that by the maintenance of "sister locals" in every port, the Negroes, by having their own unions and their own union officials, have been able to better themselves by being able to hold high positions in their locals, and have been recognized in the community as a separate, powerful voice for the Negro communities, and has attained for them and the Negro people of the community, a standing which they could not have otherwise attained. The Court believes that they are correct in this assumption, but the ultimate issue before the Court is whether this pattern or practice of having segregated locals is keeping longshoremen, be they Black or White, from equal working opportunities on account of a longshoreman's race or national origin. With the exception of the port of Brownsville, generally the longshoremen's work is divided between the White and Negro locals on a fifty-fifty basis. On its face, this would seem to be a fair shake for the races, but this does not tell the whole story. If in any port there are one hundred Whites available to work on the waterfront as longshoremen and two hundred Negroes, and the work is divided fifty-fifty between the locals, it is obvious that the one hundred Whites will work more hours than the Negroes. The fifty-fifty rule would be ideal if there were an equal number of White longshoremen to Negro longshoremen in every port, but this is not the case. The same situation would exist if instead of one hundred White and two hundred Negro longshoremen, there would be two hundred White and one hundred Negro longshoremen in a given port. In that situation, the Black longshoremen would work more hours than the White. While the Civil Rights Act of 1964 was passed to aid Negroes and other minorities, it was passed to help Whites as much as Negroes, if their civil rights are being violated, and this Court can foresee where in many situations, now and in the future, the Whites will be asking for the protection of Title VII of the Civil Rights Act of 1964.

The Defendants opposing the proposed merger of the "sister locals" have argued vehemently that the Negroes, whom the Government assumes to protect by this cause of action, are going to be the losers if the Government prevails; that the Negroes in the several ports involved in this lawsuit are getting 50% of the work, even though the racial composition of the communities is far less than 50%. They urge upon the Court that the Government in the construction industry has brought forth the so-called Philadelphia Plan, seeking job opportunities on the basis of the racial ratio in the area and community, and that if this Plan were to be put into effect, Negroes would only have 19% of the work in Houston, 21% of the work in Galveston, 30% in Beaumont, 27% in Port Arthur, 25% in Orange, 12% of the work in Freeport, 5% of the work in Corpus Christi, and only 1% of the work in Brownsville. They are off target in their argument. It is not the racial composition of the community that should control, but the number of Blacks and Whites that make themselves available for longshore work that counts.

From the many Exhibits before the Court, it is obvious that even under the fifty-fifty rule, Negroes, and in some cases Mexican-Americans, having been segregated on the basis of their race or national origin, have been forced to accept a diminished opportunity to earn wages, receive union benefits, work better cargo and otherwise enjoy employment opportunities solely on the basis of their race. A comparison of the earnings of segregated "sister locals" shows that not only the total earnings of the Negro locals, but also the earnings of individual Negro longshoremen, are less than those that work out of the White local.

Much of this disparity is due to the earnings of individual workers on the waterfront who are members of the locals, but who are hired directly by the employers,

and who are not referred by the locals, most of whom are Whites, such as the so-called Gearmen. This situation has been known for a long time, and yet the contracts entered into by and between the industry and the longshoremen have not attempted to correct this situation. However, in fairness to the unions, it must be said that they have tried, in most cases, most diligently to give 50% of the work to the Whites and 50% of the work to the Blacks, the trouble lying in the basic fact that the 50% given to the Negroes has had to be divided amongst a greater number of Negro longshoremen.

The Government has urged in this case that the very existence of segregated locals is a "per se" violation of Title VII of the Civil Rights Act of 1964. The Government has already been successful in a similar case in upholding this theory. United States of America v. International Longshoremen's Association, Atlantic Coast District, International Longshoremen's Association, and Locals 829 and 858, I.L.A., Baltimore, Maryland, D.Md.1970, 319 F.Supp. 737. This case has been cited with approval by this Circuit in United States of America v. Jacksonville Terminal Company, 451 F.2d 418 (5 Cir. 1971). In that case, the District Court had held that having segregated locals was not a "per se" violation of Section 703(c) of the Act, 42 U.S.C.A. § 2000e-2(c). United States of America v. Jacksonville Terminal Company, 316 F.Supp. 567 (M.D.Fla.1970). Our Circuit, speaking through Judge Dyer, in reversing the case said:

> "Contrary to the allegations made by the Unions, we find that their locals are not mere 'social clubs', having no influence in national union policy or practice. We conclude that the District Court erred in refusing to hold that the failure to consolidate the locals violates section 703(c) of the Act, 42 U.S.C.A. 2000e-2(c). See United States v. Sheet Metal Workers Local 36, supra at 127-129; Local 53, Interna-

tional Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, supra at 1051-55; United States v. International Longshoremen's Association, D.Md.1970, 319 F. Supp. 737, 741-742; Hicks v. Crown Zellerbach Corp., E.D.La.1970, 310 F. Supp. 536; United States v. Local 189, United Papermakers & Paperworkers, E.D.La.1969, 301 F.Supp. 906, 919, aff'd, 5 Cir., 416 F.2d 980."

If the maintenance of segregated locals is a "per se" violation of the Civil Rights Act, there the matter ends, and the relief sought by the Government, as far as ordering the merger of locals in this case, has to be granted. There is no question that segregated locals were so chartered and are still maintained. See also, Musicians' Protective Union Local No. 274, A.F. of M., and James Adams, on his own behalf and on behalf of all others similarly situated v. American Federation of Musicians of United States and Canada, E.D.Pa.1971, 329 F.Supp. 1226.

However, this Court cannot believe that it was the intention of Congress to condemn all segregated locals. If it were, they could have easily said so. The Government must still show that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin. However, in this case, the Government has discharged this burden.

In the case of the port of Brownsville, the White local, which has many Mexican-American members, has been given 75% of the work, and Local 1368, a Negro local, has been given only 25% of the work, and naturally, Local 1368 feels that they should be getting 50% of the work, and is therefore in favor of merger. A history of the Brownsville controversy shows that many of the Negro longshoremen seeking work in the port of Brownsville were recruited from other ports, and the local long-

shoremen resisted their coming down to take their jobs. The controversy resulted in the establishment of the seventy-five—twenty-five rule. The situation in Brownsville only serves to point out the inequities that can result from segregated locals.

The undersigned Judge is a lifetime resident of Brownsville, Texas, and was present when the first ship came up the Brownsville ship channel to the port of Brownsville, and even though not in the record in this case, if I may be permitted, I will recall the situation of longshoreman work in the port of Brownsville, as I remember it. When having a deep-water port at Brownsville and Port Isabel, Texas, was to become an accomplished fact, a group of men, mostly Anglo, applied for a charter to the I.L.A. The original fight was not so much between Whites and Blacks, as it was between Anglos and Mexican-Americans, who at first were having a hard time getting into the local. There were few Negroes living in the city of Brownsville, and the few that lived there had not been engaged in longshore work. Most of them worked for the railroads, a few were hotel porters, some were barber shop shoeshine boys, and one worked for the Coca Cola Bottling Company. When the Whites applied for a charter, a group of Negroes, in line with the practice of the I.L.A. to have "sister locals", applied for a charter for a Negro local. Most of the membership of the Negro local had to come from outside the Brownsville-Port Isabel area. The local people comprising the White local and those working out of its hiring hall, naturally resisted the influx of outsiders who took their jobs away from them. This Court is convinced that if the practice of having segregated locals had not been in effect, and the few Negroes who were available for longshore work in the port of Brownsville had been allowed to join the White local, the Brownsville situation would never have arisen.

The concern of the Government in this case with the situation of Mexican-Americans, has been mainly brought about by Local 1576 in Galveston. None of its members are Negro, and there are a few Anglos, and the membership is composed mainly of Mexican-American longshoremen. The charter of this local provides that its members can only work bananas and green fruit. This type of work has been drastically reduced, and the members of Local 1576 have very little work at present. It has been testified that the work of unloading bananas and green fruit is the most difficult, physically, of work done by other deep sea locals. We have a situation where the members of Local 1576, most of whom are Mexican-American as has been stated above, are able-bodied individuals wanting to do longshore work, but being limited in the opportunity of doing this type of work, because of its charter. It has been shown that they must work out of other hiring halls, instead of their own, but when they appear at said hiring halls, they compete with so-called "casuals", who are not union members. Testimony was received that Local 1576 has taken up the matter of the restriction in their charter with both the District and I.L.A., but the charter remains unchanged. They are not even included in the West Gulf Maritime Association Agreement, even though this has been requested.

There is no question that individuals belonging to Local 1576 have been denied an opportunity to work as longshoremen, because of the restrictions on their charter. Local 1576 is not seeking a merger, but apparently are demanding an equal right to longshore work in the port of Galveston.

Another local that has joined hands with the Government in seeking a merger of the locals is Local 329. Local 329, a Negro local, is only allowed by the I.L.A. to work for four stevedoring companies. At one time, these companies had a lot of business, but the type of cargo they handled has now dwindled, and Local 329

finds itself with very little work. The problems caused by this situation would not exist if all longshoremen at the port of Galveston belonged to one local. Local 329 has for years been asking the District and the I.L.A. for relief, but to no avail. The stevedoring companies have also joined in asking that Local 329 be given more work.

The basic finding that the Court is making in this cause is that the Defendants have chartered and still maintain locals on a segregated basis, that the prevalent rule of dividing the work fifty-fifty between the White and Negro locals violates Title VII of the Civil Rights Act of 1964, because it deprives longshoremen, be they Black or White, Anglo, Mexican-American or Negro, equal working opportunities depending on which group is in the majority in the different ports, and that this will be a continuing violation in the future.

A merger of locals brings with it many problems, which have to be resolved in the issuing of an equitable decree.

The evidence shows that locals own their own property, on which are housed their hiring halls, these properties not being of the same value, as amongst "sister locals". The question of seniority is also present. Although evidence shows that the I.L.A. and the District have insisted that every local have a seniority system, no real attempt at having the same seniority system within every local has been undertaken. Since no standard seniority system has been in practice in all the locals, this poses a terrific problem in modeling an equitable decree. The basic hours the longshoremen have to work to achieve seniority have differed greatly from one local to another. Since seniority and the hours worked affect the pension and welfare rights of individual longshoremen, the Court has to be mindful of the great necessity of protecting the rights of those who have spent their lives on the waterfront, as compared to those who only work on the waterfront as a sideline.

Nor is this Court satisfied that the only solution to the problem must include a merger of the locals, for a plan or scheme can be devised that would eradicate the inequity of the basic finding made above, unless the opinion in United States v. Jacksonville Terminal Company, *supra*, dictates such a course.

This Court finds that some of the relief sought by the United States is forthcoming. The Defendants, I am sure, do not agree with this conclusion, and an appeal is almost certain.

The Government has submitted to the Court a proposed decree, with which this Court is not in agreement, as in my view, parts of the proposed decree do violence to the Civil Rights Act and my interpretation of the intent of Congress. A decree that orders the merger of the locals will, of necessity, be different than a decree under the Act that does not so provide. I, therefore, certify under 28 U.S.C. § 1292(b) that my findings involve a controlling question of law, as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this litigation, and it is the hope of the undersigned that the Honorable Circuit Court of Appeals for the Fifth Circuit will accept an appeal under 28 U.S.C. § 1292(b), to determine whether the record in this case entitles the United States to relief, and whether such relief should include an order of merger of the locals involved.

Counsel for the parties will meet to try to formulate a decree for entry in this cause, upon a denial of an appeal under 28 U.S.C. § 1292(b), or a final ruling of the Circuit Court of Appeals for the Fifth Circuit, and within sixty days of either event, either submit a proposed decree agreeable to all, or inform the Court of their inability to submit such decree, with their analysis of the points they cannot agree upon.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-3587

D.C. Docket No. CA-69-B-3

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

versus

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
an unincorporated association, *et al.*,
Defendants,

I.L.A. LOCAL 1576,
Defendant-Appellee.

L.L.A. LOCAL 851,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

Before FAY, KRAVITCH and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the

District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to the plaintiff and defendant-appellants the costs on appeal, to be taxed by the Clerk of this Court.

August 13, 1980

Issued as Mandate:· Sep. 5, 1980

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-378

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1576,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 10, 1981.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 30 day of October, 1980.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1147

LOCAL 1576, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF LOCAL 307, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1147

LOCAL 1576, INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION,
AFL-CIO
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, et al
Respondents

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF LOCAL 307, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

STATEMENT OF THE CASE

Reading petitioner's Petition, the other parties to this case would immediately conclude that petitioner is discussing the facts of some other case.

A. The Locals.

ILA Local 307 is a general cargo deep sea longshoremen's union. That local is predominantly white but has an approximate 30% to 40% Mexican-American or Hispanic work force. Local 851 is also a general cargo deep sea longshoremen's union. Its membership is predominantly black but has a small percentage of whites and Hispanics in its work force. Local 329 is a deep sea longshoremen's union servicing a small group of stevedores which traditionally have handled cargoes of sacked sugar. That local is predominantly black but has a small percentage of whites and Hispanics in its work force. Local 1576 is a deep sea longshoremen's union servicing a small group of stevedores which handle green fruit cargo. That union is predominantly Hispanic but has a small percentage of whites and blacks in its work force.

In 1971, Judge Garza found as a fact that Local 1576 was discriminated against because of its limited charter and the limited work available under that charter. (Petitioner's petition, App. p. 47a.) The same basic findings was made by Judge Garza as to Local 329. (*Id.* pp. 47a-48a.) In 1971, Local 1576 just wanted an expansion of its charter. (*Id.* at p. 47a.) Local 329 wanted merger of all work. (*Id.* at p. 47a.)

In 1979, the work of Local 1576 under the charter had increased dramatically. (*Id.* p. 16a.) The work available to Local 329 had not increased. (See Appendix A, the recent Order of A. A. White, Master, ordering interim consolidation because of the deprivation being suffered by Local 329). Local 1576 no longer desires any relief in this case, it now being satisfied with the work allocated to it. Local 329 used to have a great deal of work, but

it continues to desire merger because its work since 1971 has not increased like that of 1576.

B. The Work.

Bananas are shipped on deep sea vessels in boxes in a refrigerated cargo hold. In unloading, the boxes are put on conveyors by longshoremen and then into refrigerated trucks. The only difference between unloading bananas and unloading other types of boxed cargo is that the work area is cool when working bananas.

C. Who Discriminated Against Whom?

On this issue, the Fifth Circuit observed:

> In view of this court's prior holding that segregated locals must be merged whenever they result in unequal employment opportunity, the only new evidence that could have justified excluding Local 1576 from the merger would have been evidence that the local is no longer segregated or that its segregated existence does not deprive any group of equal employment opportunity. The evidence demonstrated the contrary. Local 1576, still chartered as a union for Mexican-Americans, remains functionally segregated. *See e.g.*, Record, Vol. II, at 22-24, 41-44, 73. In 1971 the district court found that black longshoremen "have to be referred out of a [black] local hiring hall"; that "White longshoremen are referred out of a White Longshoremen's hiring hall"; and that exceptions to this practice "have been few and far between." 338 F.Supp. at 978. *See also* 511 F.2d at 277 n.8. Based on evidence presented at the September 1979 hearing on remand, the district court specifically found that this practice has not changed: few black longshoremen obtain employment through either white Local 307 or Mexican-

American Local 1576, and few white or Mexican-American longshoremen obtain employment through the black locals (329 and 851). Referring to the tradition among the Galveston locals that members of each race are expected to seek work only with the local whose membership is composed of that race, the court commented:

> I don't doubt . . . at all that when there are some Blacks there in 1576 . . . the Mexican-Americans have the first crack at it. If I made any other findings, I would be a liar.

Record, vol. II, at 217. Although the trial court may have been correct in stating that Local 1576 never actively discriminated against members of any racial group, the fact remains that as one of four segregated Galveston longshoremen's locals, Local 1576 has been part of a system which operates to discriminate against people because of race and national origin. That Local 1576 may not have intended to discriminate does not justify its exclusion from the order of merger mandated by this court. *See* 511 F.2d at 278 (Title VII does not look to the intention of those who segregate). *See also International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

REASONS FOR NOT GRANTING THE WRIT

This long tortured case is approaching conclusion. The International Union chartered the four locals in Galveston on the basis of race. In 1971, Judge Garza observed:

> "It has been stipulated that I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their mergers,

or to charter integrated locals since the passage of the Civil Rights Act." (See Petitioner's App. p. 41a).

The last question to be decided is whether an Hispanic local should be excluded from the merger because it is now satisfied with its allocation of work. It seems to us that, if it was true in 1971 that the allocation of meager green fruit trade to the Hispanics violated their civil rights it must also be true in 1979 that allocation of meager general cargo work to whites and blacks violates their civil rights.

Nothing in *Teamsters v. United States,* 431 U.S. 324 (1977) or the other cases cited by petitioner dealing with the interplay between Title VII and the National Labor Relations Act has any decisional bearing on this case. Petitioner's argument that 1576 never discriminated against anyone must be viewed in the light of the record and the findings of the Fifth Circuit, quoted *infra* p. 3.

CONCLUSION

For the foregoing reasons, the Writ should be denied.

Respectfully submitted,

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713/228-1521
Attorneys for Respondent, Local 307

CERTIFICATE OF SERVICE

This is to certify that on the_____day of February, 1981, true and correct copies of the above and foregoing instrument were served on the following counsel by placing same in properly addressed envelopes, postage prepaid, and depositing in the United States mail:

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SIDNEY RAVKIND

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO. 69-B-3

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
Plaintiff

v.

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, ET AL

INTERIM ORDER

Pursuant to the authority vested in me by the Order of Reference entered herein on August 17, 1979, as revised by the Court on February 1, 1980, reported hearings were held in Galveston, Texas on June 17, 1980 and September 18, 1980. Unreported hearings and conferences had previously been held. At those hearings and conferences facts were presented and arguments were made. The Master has also entered orders herein for the performance of certain actions, one on July 21, 1980 and another on September 26, 1980. On the basis of the facts presented and the arguments made at said hearings and conferences, and the information presumed to have been developed in complying with said orders, it is further found and ordered, pending the issuance of a final order herein, that I.L.A. Locals 307, 329 and 851 proceed as follows:

1. By the Master's Order dated September 26, 1980, each Local was to have perfected its seniority list by November 1, 1980, to have made a copy of said list available to the other two Locals, and to have announced that its supporting information was available for inspection. The Master has not heard otherwise, and it is presumed that such was done.

In the Month of November, 1980, the Locals were to consolidate those lists. The Master has not been advised otherwise, and it is presumed that such was done.

2. It is found that Longshoremen working out of I.L.A. Local 329 have long been at a disadvantage, when compared to men working out of I.L.A. Locals 307 and 851, with respect to work opportunities. There is simply less work per man available through this Local. Judge Garza and the Master have thus far respected the wishes of the Galveston Locals that they not be formally merged until the Houston Deep Sea Locals are merged. This makes it imperative that interim relief be given to men working out of Local 329.

3. I find that the hiring hall of I.L.A. Local 307 is adequate to be used as a temporary hiring hall for the combined Longshoremen working out of the three Locals named herein. The hiring hall of Local 851 is also adequate for that purpose. In fact the hiring hall building of Local 851 is some better than the hiring hall building of Local 307, but the possibilities for expanded parking at the hall of Local 307 appears substantially better than at Local 851, and parking is regarded as crucial.

Locals 307, 239 and 851 are, therefore, hereby ordered, effective March 1, 1981, to consolidate all of their Longshoremen hiring activity in the hiring hall of Local 307. The hiring will be conducted pursuant to the merged seniority list presumed to exist under item 1 above. In the event such presumption is in error, and such a list does not exist now or by March 1, 1981, then each Longshoreman shall have, for the purposes of the combined hiring hall activity, the number of years of seniority he has in his own local, and a year of seniority in any local shall be equal to a year of seniority in each of the other two locals.

The Committee constituted by the order of the Master dated July 21, 1980 is hereby charged with the responsibility of implementing this Order including any remodelling required of the hiring hall of Local 307 and expanding its parking area. Any expenses incurred are to be borne equally by the three Locals named herein since it will be used by all three and since the hall or the proceeds from its sale will eventually become the property of the merged local.

If there are objections to this order, they should be filed with the master in the greatest detail feasible by February 15, 1981. A copy of such objections should be provided the other parties. If such objections are filed, a hearing will be held in Galveston on February 25, 1981 to resolve those objections.

Entered this the 20th day of January 1981.

/s/ A. A. WHITE
A. A. White, Master

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1147

LOCAL 1576, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL,
Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the Court of Appeals:

Local 307 and Local 851, International Longshoremen's Association, AFL-CIO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1147

LOCAL 1576, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL,
Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Local 851, International Longshoremen's Association, AFL-CIO, respectfully requests this Honorable Court to deny the petition for writ of certiorari of Local 1576, International Longshoremen's Association, AFL-CIO, to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 13, 1980.

OPINIONS BELOW

The original opinion of the district court is reported at 334 F.Supp. 976 (S.D. Tex. 1971) and is reprinted in the appendix attached to the petition for writ of certiorari filed by the I.L.A. Local 1576 at App. E (39a-49a). The first opinion of the court of appeals is reported at 511 F.2d 273 (5th Cir. 1975) and is reprinted in the petition for writ of certiorari at App. D (23a-37a). This Court's denial of a petition for certiorari to that judgment is reported at 423 U.S. 994 (1975) and is reprinted in the petition for writ of certiorari at App. C (22a). The decision of the district court on remand is unreported; it is reprinted in the petition for writ of certiorari at App. B (13a-21a). The second decision of the court of appeals—the decision from which certiorari is sought—is reported at 623 F.2d 1054 (5th Cir. 1980) and is reprinted in the petition for writ of certiorari at App. A (1a-12a).

JURISDICTION

This Court has jurisdiction to review the judgment of the court of appeals by certiorari, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-2(c), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization:
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual

> because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment oportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 706(g), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-5(g), provides, in pertinent part, as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was

refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) of this title.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW:

This case was originally instituted in 1969 by the United States against the International Longshoremen's Association (I.L.A.) and thirty-seven "deep sea locals" in the port cities of Texas under Title VII of the Civil Rights Act of 1964. The Government alleged that the union and the locals discriminated against Blacks and Mexican-Americans by maintaining segregated locals, hiring halls, and work gangs in violation of Title VII and requested an order directing merger and discontinuance of all segregated locals. The longshoremen's locals involved in this particular controversy are Locals 307 and 851, which are locals comprised of Black members; Local 329, predominately a White[1] local; and, Local 1576, a Mexican-American local.

In 1971 the district court found that the maintenance of completely separate unions would tend to deprive individuals of employment on the basis of race, but held that segregated unions, in themselves, did not constitute a violation of the Civil Rights Act of 1964. The district court

---

1. We use the term "White" in this petition, following the lower court's usage, to refer to White longshoremen who are not of Mexican descent. At some places in the record the term "Anglo" is used with the same meaning.

found that "membership of each [longshoremen's] local union [within the State of Texas] is totally segregated on the basis of race or national origin" in accordance with the charter granted by the I.L.A.; that "Negro longshoremen have to be referred out of a Negro local hiring hall, and White longshoremen are referred out of a White longshoremen's hiring hall" and that exceptions to this practice "have been few and far between;" that it is "obvious that a Negro does not apply to a White local and a White does not apply to a Negro local for membership;" and that the maintenance of segregated locals violates Title VII because it deprives all longshoremen of equal working opportunities solely on the basis of race or national origin, *United States v. International Longshoremen's Association*, 334 F. Supp. 976, 978-980 (1971).[2]

Even though the district court specifically found that segregated locals deprived longshoremen of equal employment opportunities, it refused to order the consolidation of the locals in each port and held that Title VII of the Civil Rights Act could be fully corrected by the abolishment of separate hiring halls and the establishment of a common hiring hall and common seniority classifications.

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2. "The court made specific findings concerning two locals in Galveston—Locals 1576 and 329. With respect to Local 1576 it found that its membership is composed predominately of Mexican-American longshoremen with no Blacks and few Whites; that its charter provides that its members can only work bananas and green fruit; and that, because of the restrictions on their charter, members of Local 1576 have been denied an opportunity to work as longshoremen. 334 F.2d at 981. Similarly, the court found that the I.L.A. allows Local 329, a Black union, to work only for four stevedoring companies which provide little work. *Id.* It concluded: [t]he problems caused by this situation would not exist if all longshoremen at the port of Galveston belonged to one local."

The Government appealed the court's refusal to merge the locals and the Fifth Circuit reversed. The Fifth Circuit held that Title VII could not "be satisfied in the present case by measures short of the merger in each particular port of the racially segregated locals within the port." *Equal Employment Opportunity Commission v. International Longshoremen's Association,* 511 F.2d 273, 290 (5th Cir. 1975) *cert. denied,* 423 U.S. 994 (1975). Judge Goldberg stated that segregated unions could not be maintained under Title VII because they inevitably tend to deprive individuals of employment opportunities. *Id.* at 277. Judges Thornberry and Godbold (specifically concurring) stated that segregated unions could not be maintained where, as in the case before it, "they are shown to have had actual discriminatory effect on employment opportunities." In such circumstances, they concluded, the district court has no discretion to refuse merger. *Id.* at 280. The case was remanded to the court "in accordance with the opinion of [the Fifth Circuit]."

In 1973, before the Fifth Circuit had even considered this appeal, three of the four Galveston locals filed a joint motion to exclude Local 1576 from the merger of the hiring halls which the district court had previously ordered.[3] In 1976, after the Fifth Circuit issued its mandate to the district court to merge all the locals in each

3. Local 329 did not join in this Motion. The other three Galveston locals later changed their position and joined sides with the Government requesting that Local 1576 be included in the merger when it was discovered that Local 1576 wanted to maintain dual seniority, which would exacerbate the discriminatory effect of separate locals by giving the Mexican-Americans their seniority in Local 307, while not reciprocating with the two Black locals, 329 and 851.

port, the district court held three hearings on the motion to exclude 1576 from the merger.[4]

The evidence presented at these hearings demonstrated that Local 1576 remained almost exclusively a Mexican-American local. In 1971 Local 1576 had 140 members, of which there were *no* Blacks and only twenty Whites. In 1977 Local 1576 had 250 members, of which there were only three Blacks and thirty Whites. The statistics clearly reflect that from the time the district court found that Local 1576 was a segregated local until 1977, Blacks increased their percentage from zero percent to one percent of the total membership in the union. The percentage of White membership actually decreased from fourteen percent to twelve percent.

The evidence presented at the three hearings demonstrated that members of Local 1576 perform the same nature of work as members of the other Galveston locals. Little skill is required of longshoremen unloading bananas.[5] Similarly, while several job classifications in gen-

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4. These hearings were held on August 16, 1976; February 10-11, 1977; and, September 19, 1979.

5. The petitioner, all through its brief to this Court, attempts to persuade the Court that the longshoremen of Local 1576 have a skill that is unusual and unique, a skill that is not easily acquired except after years of training and experience. The evidence presented in the hearing in September, 1979 is completely repugnant to these contentions. The president of Local 1576, Mr. Louis Sendejas, testified on cross-examination by the undersigned counsel as follows:

Q. So the work is basically the same, but the prime requisite is that you have a healthy body and nothing else; is that right?

A. Yes.

Q. The stronger the back and the better it is built, as long as you can work in 1576, there is nothing to prevent the people in 1576 from doing the work of 307, 851, or 329,

eral cargo work gangs require a certain degree of skill—which generally can be acquired through experience—many employment functions performed by general cargo longshoremen require little or no skill. Banana work is less difficult physically than unloading other kinds of cargo such as cotton or grain, and banana work gangs and other longshore work gangs in Galveston are all selected in substantially the same manner. Both banana and other longshoremen gangs occasionally include inexperienced workers but, with more experienced workers to learn from and to observe, inexperienced longshoremen do not erode the efficiency of longshore work gangs in Galveston.[6]

Local 1576 points out that its seniority system differs from those of the other three Galveston locals in two re-

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because of any requirement of any special talent or skill; is that right?

A. Well, on bananas, you have a little skill on the truck. You have to have some skill. You have got to be trained for that.

Q. I see. And those four Blacks, they have that skill?

A. Well, they learn it like the others do.

Q. That is all right. You don't think that the rest of the Blacks in 851 and 320 could—

A. I am not saying Blacks or Whites or anything. I am saying that any man that goes to work for us has to learn the skill to load it on the truck. You have ventilation space and all that on there.

Q. It would take at least one full day to learn?

A. At least.

Q. Okay. No more than that, though?

A. Anybody could catch on.

Q. Right. So, there really is no real job distinction as between the work being done by 1576 and the others, is there, other than the air conditioning? Is that right?

A. Right.

Mr. Moore: Thank you.

(79Tr.-53-54)

6. 77Tr. 131-132, 144, 148-150, 156-160, 171, 178, 190-198; 79Tr. 52-54, 166-168, 189-190, 205-206.

spects. First, their system is based on steps of one-year intervals while the other locals (307, 329 and 851) are based on five-year intervals. Second, to achieve one year of seniority credit in Local 1576, its members need only work 300 hours per year; members of the other three locals must work 700 hours.

Of Local 1576's 250 members, 43 also have seniority in Local 307, the White local, (since Mexican-Americans have always been included as "Whites") which they gained as a result of being allowed to work general cargo through Local 307's hiring hall. However, because of the discriminatory effect of the founding and maintenance of these separate unions on the sole basis of race, Black longshoremen have been referred only through the two Black hiring halls, Locals 851 and 329, and as a result, have no seniority in either Local 1576 or Local 307.

Thus, members of Local 1576 have the exclusive work of the bananas and, when they are not working bananas, are then able to work with general cargo out of the White Local 307; and, members of Locals 851 and 329 (the Blacks) can rarely work with bananas and green fruit, and, hence, have never been allowed to develop any seniority in either the White Local, 307, or the Mexican-American Local, 1576.[7]

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7. 77Tr. 147-148; 79Tr. 26-28, 33-37, 38-39, 41, 44, 45-46, 55-56, 78, 79, 81, 97, 104-108, 112, 113-115, 164-166, 173-178, 176, 187-189, 191, 194, 198, 200-201, 225-226, 228-229, 232-233, 252-254, 258.

If Local 1576 is not included in the merger of all locals, it can readily be seen that the discrimination which has been fostered from the very inception of the granting of all four of the I.L.A. Local's charters allows an unusual reward to the members of I.L.A. 1576; these members would then benefit from the fact that the Blacks, who have been traditionally excluded from Local 1576, and who have not had the opportunity to develop seniority in Local 1576

Two weeks after its hearing of September 19, 1979, the district court entered its order excluding Local 1576 from the merger and dismissed Local 1576 from the lawsuit, completely reversing its earlier "limited merger" order of November 12, 1971.

Not only did the district court fail to follow the law of the case as established by the Fifth Circuit in the prior appeal, but the district court, in its 1979 memorandum and order, failed to follow its original findings of fact and conclusions of law of 1971.[8] This glaring inconsistency

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through the years, must now share their available work after the mergers of Locals 307, 329 and 851, with the members of Local 1576, who, by being Mexican-Americans, have never been kept out of the White local and, thus, have always been able to accumulate seniority in Local 307.

8. In its Memorandum of November 12, 1971, (App. E, 38a-49a, petitioner's application for writ of certiorari) the court found at 41a that:

> "It has been stipulated that the I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their merger, or to charter integrated locals since the passage of the Civil Rights Act."

At 47a, the court went on to find:

> "There is no question that individuals belonging to Local 1576 have been denied an opportunity to work as longshoremen, because of the restrictions on their charter. Local 1576 is not seeking a merger, but apparently is demanding an equal right to longshore work in the port of Galveston."

And, at 48a, the district court went on to make its basic findings:

> "The basic finding that the Court is making in this cause is that the Defendants have chartered and still maintain locals on a segregated basis, that the prevalent rule of dividing the work fifty-fifty between the White and Negro locals violates Title VII of the Civil Rights Act of 1965, *because it deprives longshoremen, be they Black or White, Anglo, Mexican-American or Negro, equal working opportunities depending on which group is in the majority in the different ports, and that this will be a continuing violation in the future.*" (Emphasis supplied.)

in not considering its own findings and the district court's refusal to implement the Fifth Circuit's original order of 1975 is all highlighted in the opinion of the Fifth Circuit of August 13, 1980 (reprinted in the petition for writ of certiorari at App. A 8(a), where the court, referring to its first reversal in 1975, stated:

> "When this Court reversed and remanded the case, holding that there was no discretion to refuse merger, it clearly contemplated that the four deep-sea locals in Galveston would be merged. This message was clearly understood; on remand Judge Garza told counsel he would listen to arguments why Local 1576 should not be merged, but 'I just know that the Fifth Circuit is going to send it back to me.' Supp. R. vol. III, at 35. *His prophecy is correct.*" (Emphasis Supplied.)

The Fifth Circuit continued, setting out the gist for its refusal to accept the district court's order of October 1, 1980 by finding:

> "The district court failed to find an applicable exception to the law of the case doctrine to justify its deviation from the court's mandate. There is no contention that controlling authority since this court's 1975 decision dictates a contrary decision of the law applicable to this case; nor did the district court presume to hold that this court's decision was clearly erroneous. *Further, the evidentiary hearings conducted since this court's ruling have not produced any new or substantially different evidence which would justify the exclusion of Local 1576 from the Galveston merger.*" (Emphasis Supplied.)

B. REASONS FOR DENYING THE WRIT

Although the Supreme Court of the United States is not bound by the law of the case doctrine since it did not decide this case on the merits when it denied certiorari in 1975, 423 U.S. 994, it must be noted that the Fifth Circuit reversed the district court's order to exclude Local 1576 from the merger of the other three Galveston locals because it was contrary to the clear mandate of the Fifth Circuit in *Equal Employment Opportunity Commission v. International Longshoremen's Association,* 511 F.2d 273 (5th Cir. 1975), *cert. denied,* 423 U.S. 994 (1975). Since 1975 when four members of the United States Supreme Court refused to grant the previously filed petition for writ of certiorari, there have been no changes in the controlling authority since the Fifth Circuit's 1975 decision; nor did the district court find that the Fifth Circuit's prior decision was clearly erroneous; nor did the district court find any new or substantially different evidence that would require or remotely justify the exclusion of Local 1576 from the Galveston merger. In short, there is no basis to grant a review of the judgment of the United States Court of Appeals for the Fifth Circuit, *Equal Employment Opportunity Commission v. International Longshoremen's Association,* 623 F.2d 1054, 1059 (1980).

The subsequent hearings held by the district court did not produce any substantially different evidence than what was produced in 1971. The only new evidence that could have justified excluding Local 1576 from the merger would have been evidence that the local is no longer segregated or that its segregated existence does not deprive any group of equal employment opportunity. *The*

evidence demonstrated the contrary. Local 1576, still chartered as a union for Mexican-Americans, remains functionally segregated. *E.E.O.C.*, 623 F.2d at 1059. The district court in its 1971 opinion found the following facts:

> "While attempts were made to prove to this court that a Negro could apply for membership in a White local and vice versa, it is obvious that a Negro does not apply to a White local and a White does not apply to a Negro local for membership. Negro longshoremen have to be referred out of a Negro local hiring hall and White longshoremen are referred out of a White longshoremen's hiring hall. While there may have been exceptions in the past, they have been few and far between." 334 F. Supp. at 978.

These discriminatory practices have not changed since 1971. Few, if any, Black longshoremen obtain employment through the White local or 1576. In fact, out of a membership of 250, in 1977 there were only three Black members in Local 1576.

I. THE DECISION OF THE COURT OF APPEALS REGARDING THE SENIORITY SYSTEM OF I.L.A. LOCAL 1576 IS NOT CONTRARY TO THE APPLICABLE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

A close reading of 42 U.S.C. § 2000e-2(h),[9] hereinafter referred to as Section 703(h), reveals that it is not

9. (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority

applicable to the facts of our case and, therefore, the decision of the court of appeals is not in conflict with this court's opinion in *Teamsters v. United States,* 431 U.S. 334 (1977). Section 703(h) pertains to situations where an *employer* applies "different terms, conditions, or privileges pursuant to a bona fide seniority system." In our case, Local 1576 set up its own seniority system; and, in fact, the evidence reflects that they modified that seniority system on several occasions. (79Tr.-15 and App. B [15a] of the petition for writ of certiorari.) It is the internal duty of Local 1576's union officials to determine who has seniority and what workers to send to the stevedore companies for unloading. A literal interpretation of Section 703(h) would require this court to disregard the "seniority system" exception and uphold the merger of the four deep sea longshoremen locals.[10]

Even if this Court might find that Section 703(h) is applicable, the decision of the court of appeals is still not contrary to this court's decision in *Teamsters v. United*

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or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, . . .

10. The petitioner contends that the merger of Local 1576 with the other three locals in Galveston, Texas should not have been ordered because the merger abolishes its lawful seniority system. The petitioner tells this court that the other three locals maintain a common seniority system with Local 1576's seniority system being separate. Each local has its own seniority system. For example, if a member of Local 851 has five years seniority with Local 851 and goes to Local 329, he will only receive employment as a Temporary and cannot use his five years seniority with 851 as a means of being hired at 329. Therefore, each of the other three locals will have their respective seniority systems abolished by the merger. If petitioner's argument is correct, then the court of appeals' merger of the other three locals would also have been incorrect.

States, in that the petitioner's seniority system was not "bona fide." In *Teamsters* this Court relied on Section 703(h) to uphold the seniority system under review even though the seniority system was not justified by business necessity and operated to freeze the status quo of prior discriminatory employment practices. The court concluded that Section 703(h) would apply if the seniority system was found to be "bona fide." In determining whether a seniority system is bona fide, the totality of circumstances in the development and maintenance of that system is relevant in examining "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system [which is] integral to a determination that the system is or is not bona fide. *Swint v. Pullman-Standard,* 624 F.2d 525 (5th Cir. 1980); *Dobbs v. City of Atlanta, Georgia,* 606 F.2d 557 (5th Cir. 1979); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); *James v. Stockham Valves & Fittings Co.,* 559 F.2d 310, 352 (5th Cir. 1977).

The court of appeals in *James, Supra* at 352, discussed four factors from *Teamsters* in determining whether a seniority system is bona fide:

(1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

(2) whether the seniority units are in the same or separate bargaining units;

(3) whether the seniority system has its genesis in racial discrimination; and,

(4) whether the system was negotiated and has been maintained free from any illegal purpose.

The seniority system does not operate to discourage employees from transferring between seniority units.

The relative seniority system of the four locals discourages Blacks more than any other group from transferring between seniority units. In *Teamsters,* the court found that the seniority system applied equally to all races and ethnic groups and "to the extent that it 'locks' employees into non-line-drivers jobs, it does so for all." The court found that "not all city drivers and servicemen who are discouraged from transferring to line-driver jobs are all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority is White." *Teamsters, supra* at 355. Therefore, Whites working as city drivers were faced with the same dilemma as the Black workers in *Teamsters* in that to leave one's position as a city driver a White worker, as well as a Black worker, would have to forfeit his city driver seniority. In our case, the relative seniority systems are not applied equally to all races and ethnic groups. Blacks are locked into their "general cargo jobs" within Locals 851 and 329, not being able to acquire seniority in the more desirable banana boat work.[11]

Local 1576 is in a separate bargaining unit from the other three locals.

Even though Local 1576 is in a separate bargaining unit from the other three locals and that separate bargain-

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11. A good example of the disparity was reflected in the district court's 1971 opinion. In 1971 Local 329 was only allowed by the I.L.A. to work for four stevedoring companies and was seeking a merger of the locals so it could be given more work. The members of Local 329, exclusively Black, would be discouraged from seeking employment from the other locals without any seniority in those locals.

ing unit is consistent with the National Labor Relations Board precedent defining separate units of banana handlers in the longshore industry, it must be remembered that Local 1576 was created by Mexican-Americans who left Local 307. The present seniority system was not implemented until after the enactment of Title VII of the Civil Rights Act.

The seniority system had its genesis in racial discrimination.

All the parties to the lawsuit stipulated that "the I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their merger or to charter integrated locals since the passage of the Civil Rights Act." 334 F. Supp. at 978. The purpose of chartering separate locals was to maintain workers in separate locals whereby Blacks would work together in Black locals, Whites in White locals and Mexican-Americans in Mexican-American locals. Because of the stipulation of the I.L.A. and the finding of the district court on this issue, it is apparent that the establishment and maintenance of the segregated locals was based on no other consideraiton than the objective to separate the races.

The system was not negotiated nor has it been maintained free from any illegal purpose.

As referred to previously, the local longshoremen unions had their genesis in racial discrimination. Each local union maintained its own membership based on race and had its own seniority system. The individual

seniority systems would encourage Blacks to stay with Blacks, Whites with Whites, and Mexican-Americans with Mexican-Americans.[12]

II. THE DECISION OF THE COURT OF APPEALS IN ORDERING THE MERGER OF THE LOCAL UNIONS IS NOT CONTRARY TO THE DECISIONS OF THIS COURT REQUIRING THAT TITLE VII BE APPLIED IN A MANNER CONSISTENT WITH OTHER STATUTES EXPRESSING THE NATIONAL LABOR POLICY.

The petitioner takes an overly broad view of this Court's statements that Title VII must be interpreted and administered in accordance with national labor policy and is incorrect in its assertion that the court of appeals in this case made no attempt to accommodate its remedial order with the national labor policy.

In *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50 (1975), this Court held that the National Labor Relations Act does not give minority employees the right to bypass their exclusive bargaining representative in order to bargain with their employer over issues of employment. This Court's decision dealt with the orderly process of union representation which could only be guaranteed by exclusive representation. This Court only interpreted the mandate of Congress in that members of unions be given the right to gather their collective strength and bargaining power when dealing with their

12. Notwithstanding the fact that only one percent of Local 1576's membership was Black in 1977, a Black individual working in Local 851 would still be discouraged from seeking employment in Local 1576 because any hours accumulated with Local 1576 would not apply to his obtaining his 700 hour per standard at Local 851.

employer and not allow certain individuals as splinter groups to dilute the union's collective strength.[13]

The court of appeals implemented the most appropriate remedy in ordering the merger of the four deep sea longshoremen locals. Although Local 1576 has a separate bargaining unit and does not deal with the same employer as the other three locals, it must be remembered that Local 1576's charter was borne out of the discriminatory chartering of the locals by the I.L.A. In addition, the jobs performed by the members of Local 1576 are sufficiently similar to the jobs performed by the members of the other locals. The record shows that all Galveston longshoremen perform the same nature of work; that the work is essentially unskilled, with those skills required for certain job classifications readily acquirable through work experience; that some members of Local 1576 regularly work through Local 307 performing general cargo functions; that inexperienced workers are frequently included in work gangs and their inclusion does not diminish the ability of gangs to perform efficiently and that any individual who is physically capable can per-

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13. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 135 (1977) this court held that an agreed upon seniority system in a collective bargaining agreement could not give way so that an airline employee would not have to work on Saturdays contrary to his religious beliefs. This court based its opinion on the "seniority exception" of Section 703(h) of Title VII and its opinion in *Teamsters v. United States*, 431 U.S. 324, 352 (1977). As discussed in Part I of this brief, this case can be distinguished from this court's opinion in *Hardison*. Likewise, in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980) this court based its decision on Section 703(h) of Title VII and its opinion in *Teamsters* in holding that a provision in a statewide brewery industry collective bargaining agreement requiring a "temporary" employee to work at least 45 weeks in a simple calendar year before becoming a "permanent" employee was a component of a "seniority system" within Title VII. As discussed in Part I of this brief, this case can be distinguished from *Bryant*.

form longshore work regardless of the particular commodity being loaded or unloaded.[14]

Although its members wanted to be excluded from the merger in 1971, they wanted more "general cargo" business because their charter was limited to green fruit and bananas. The members asked the I.L.A. and the district to remove the "green fruit" restriction on their charter because the green fruit business was drastically reduced at that time. They were denied an opportunity to work because of the restrictions on their charter which arose out of the discriminatory chartering of the locals by the I.L.A. Local 329, one of the four Black locals, is only allowed by the I.L.A. to work for four stevedoring companies and has very little work. The district court recognized this problem that had arisen out of the artificial creation of locals because of race and national origin. It saw that many workers, be they Black or Mexican-American, were denied the opportunity to work simply because of their race or national origin. In fact, the court stated:

> "The problems caused by this situation would not exist if *all* longshoremen at the port of Galveston belonged to *one* local." (App. E [48a] of petition for writ of certiorari) (Emphasis supplied.)

In 1981 the same problems exist except that the green fruit business has increased while the other cargo business has diminished. Again, Blacks are denied opportunities to work simply because of the discriminatory chartering of the locals. The district court's finding of

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14. (77Tr. 149-50, 156-60, 171, 178, 182, 184-85, 187-88, 190, 192-93, 194-95, 198; 79Tr. 52-54; 77Tr. 144, 148-50, 180-81, 183, 193, 208; 79Tr. 53, 166-68, 205-06).

ten years ago remains true today in that unemployment problems of Blacks on the Galveston waterfront "would not exist if all longshoremen at the port of Galveston belonged to one local." The sloathful, foot-dragging procession of this attempted merger has continued to dominate the plight of all longshoremen in Galveston, whether they be Black, White or Brown!

For these reasons, the exclusion of Local 1576 from the Galveston merger "would deprive or tend to deprive" individuals of equal employment opportunities. *See* 511 F.2d at 277; *Bailey v. Ryan Stevedoring Co.*, 528 F.2d 551, 556-557 (5th Cir. 1976) *Cert. denied, sub nom., Local 1830 International Longshoremen's Association v. Bailey*, 429 U.S. 1052 (1977). Local 1576 must be included in the merger. Such a merger will provide necessary employment security to all Galveston longshoremen, which all longshoremen have missed since the Government took up its task over eleven years ago. As the history of the port of Galveston has shown, fluctuation in business at the port among the four locals has meant that working opportunities have not been divided evenly among the four locals. Without the merger of all the locals, Black longshoremen will continue to have little or no opportunity to obtain work unloading bananas and green fruit; and, in the event the banana and green fruit business should decline, many Mexican-American longshoremen will have less opportunity to obtain general cargo work. With this in mind, the court of appeals made a factually correct and legally sound decision in ordering the merger of all four deep sea longshoremen locals into one.

III. THE DECISION OF THE COURT OF APPEALS ORDERING CHANGES IN BUSINESS OPERATIONS IS NOT IN CONFLICT WITH ANOTHER CIRCUIT.

In its most alluring effort to create magic, the petitioner now claims that the decision of the Court of Appeals for the Fifth Circuit has the effect of ordering major changes in business operations, and that such a ruling is in conflict with the holding of another circuit court. In making its "bootstrap" attempt to obtain a review of the Fifth Circuit's order, the petitioner weaves a "straw man" with liberally laced conclusions concerning the effect the merger of Local 1576 will have on Southern Stevedoring Company, none of which can be found either in the record or in any of the findings of fact of the district court. In neither of its orders of 1971 and 1979 did the district court ever give the slightest hint that it could see any adverse changes in the business operations of Southern Stevedoring Company. In the eleven years that this case has been pending, Southern Stevedoring Company has obviously made no attempt to file a petition in intervention nor any other petition for relief. Neither has it made any effort to protect any "so called business interests" that would be adversely affected because of the merger of Local 1576 with the other Galveston locals. The reason for this is obvious; the merger of all Galveston locals will give this company a larger and more readily available work force.

Since Southern Stevedoring has been aware for the last eleven years that a merger of all locals in Galveston was due, it is logical as well as equitable for any court

to conclude that there will be no adverse effects on Southern Stevedoring Company.[15]

Nonetheless, the petitioner argues that the opinion of the Second Circuit in *E.E.O.C. v. Local 14, International Union of Operating Engineers,* 553 F.2d 251 (2d Cir. 1977) is in conflict with the opinion of the Fifth Circuit in our case. The Second Circuit in *E.E.O.C.* did not hold that a court could not use its Title VII remedial power to restructure business practices. In that case the contractors associations did not participate in the trial of the case, and consequently, were not allowed to offer evidence as to the effect of the merger of the two locals upon them. The Second Circuit reversed the district court's order because "included in the pretrial order issued by the district court was a stipulation between GCA [the contractors association] and the E.E.O.C. that the former would have 'a full opportunity to offer proof' on the issue of relief." *E.E.O.C., supra* at 257. Even a broad reading of this case could only be interpreted to allow the employers to introduce evidence as to the effect of the merger on their business. The decision does not prohibit the restructuring of the employers' business operations in order to cure violations of the Civil Rights Act.

The petitioner also argues that this Court's holding in *Furnco Construction Corp. v. Waters,* 438 U.S. 567

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15. It is also noted that Southern Stevedoring Company offered no evidence at the hearing of September, 1979. On the other hand, West Gulf Maritime Association did participate in all evidentiary hearings and its most scholarly and learned counsel, Mr. Bryan Williams (who, unfortunately, is now deceased) specifically informed the district court that his client was taking no position regarding the merger of Local 1576 with the other locals. (79Tr. 260-261)

(1970) that federal courts cannot order a remedy against an employer that has not violated the Act stands for the principle that courts cannot order changes in a party's business operations. *Furnco* is clearly distinguishable from the facts in our case and even the petitioner's broader interpretation should not be applicable to our case. In *Furnco* it was the employer, and not a union, that was alleged to have violated that Act. Furthermore, the *Furnco* court reversed the court of appeals' finding that the employer had violated the Act because of the treatment of the nature of the evidence necessary to rebut a prima facie case of discrimination. The *Furnco* court said that since the employer could articulate legitimate and nondiscriminatory reasons for the rejection of certain Blacks from employment, it was able to rebut the Government's prima facie case. *Furnco,* 438 U.S. at 578. In our case, Local 1576 never did substantiate why in 1971, it did not have one Black member; and why in 1977, it had only three Black members!

IV. THE DECISION OF THE COURT OF APPEALS IS NOT CONTRARY TO THIS COURT'S DECISIONS GOVERNING THE ALLOCATION OF AUTHORITY WITHIN THE FEDERAL SYSTEM.

The petitioner argues that the Fifth Circuit overstepped its limitation of power when it ordered the district court to implement a remedy more encompassing than the one fashioned by the district court and contends that the Fifth Circuit's mandate to the district court to merge all of the segregated union locals was therefore erroneous.

A district court must fashion its remedy in light of the purposes of Title VII of the Civil Rights Act. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, the Supreme Court, in citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), stated that the primary objective of Title VII was a prophylactic one:

> It was to achieve equality of employment opportunities and remove barriers that have been operated in the past to favor an identifiable group of White employees over other employees.

The *Albemarle* court further stated:

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to secure complete justice. . . . Where racial discrimination is concerned, 'the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Albemarle, supra* at 418.

The district court failed to carry out the mandate of Congress when it enacted 42 U.S.C. § 2000e-2(c)(2).[16]

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16. In its MEMORANDUM and ORDER of October 1, 1979, the trial court made many determinations of fact, which were not sustained by the record, in order to achieve the result that it wanted, to-wit: to find a basis to exclude Local 1576 from the merger. It should be noted that many letters and pleas by the Mexican-Americans had been sent directly to the district court through the years without the other parties to this lawsuit having been notified of same and without the other parties to this lawsuit having been furnished copies of any such letters. These were in the nature of

That statute puts an extremely heavy burden on those who wish to maintain segregated unions. Even though by having a "common hiring hall" whereby Blacks would be entitled to be picked for longshore work on the same footing as Whites and Mexican-Americans as the district court formulated in its 1971 opinion, there still would be maintained "separate but equal" union locals. Under

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"ex parte" communications with the court by the members of Local 1576, none of whom were, of course, attorneys in the case. (79Tr. 258-260)

The most glaring example of the district court's unwillingness to be bound by the evidence in the record is in its memorandum and order when it considered what it called its "three alternatives" with regard to an appropriate action. The court described its first alternative as merging the four locals together under a uniform seniority system; its second was to order a merger excluding 1576, but requiring those members of Local 1576 that have dual seniority to choose between Local 307 and Local 1576. The third alternative, and the one that the court chose was to order the merger excluding 1576 and allowing its members to retain their dual seniority.

In discussing its stated first alternative in its memorandum and order, the court reasoned:

> *"If the merged local would grant a year's seniority to any longshoremen who had qualified in his own local and who had been available for longshore work regardless of the hours worked, the first alternative would be acceptable."* (App. B, 18a, petitioner's application for writ of certiorari) (Emphasis Supplied)

With respect to testimony that the court elicited from Mr. Leroy Hoskins, President of Local 851, the court then went on to say that:

> *"Nonetheless, it was apparent that Mr. Hoskins did not agree with his attorney's stipulation."* (Footnote 3, App. B, 18a, petitioner's application for writ of certiorari) (Emphasis Supplied)

A close review of the record and the facts of that hearing indicate that the district court's statement is absolutely untrue. After the court had elicited an answer from Mr. Hoskins, counsel for Local 851 made a stipulation into the record which was accepted by Mr. Hoskins and which was then, as well as now, still binding on Local 851. Local 851 had made the stipulation that it would allow and grant a year's seniority to a longshoreman in Local 1576 who had qualified in his own local with 300 hours, assuming that Local 1576 was merged with the other three locals. Nobody except the district court, in its memorandum and order, rejected that stipulation. (79Tr. 214-216)

the district court's original plan, Black, White and Mexican-American longshoremen could conceivably be paid the same wages, have an equal number of representatives on the contract negotiating team, and under a common seniority and hiring hall system, be assured of an equal chance of obtaining longshore work. The Fifth Circuit recognized that merely placing the Black longshoremen on the same economic level as the White and Mexican-American longshoremen was not what Congress intended in passing Title VII. As the Fifth Circuit discussed in the first review of this case, "any segregation which tends to deprive an individual of opportunities is illegal," 511 F.2d at 517. The Fifth Circuit saw the incompletion of the district court's remedy in light of the "separate but equal" cases which have been handed down by this court since *Brown v. Board of Education,* 347 U.S. 483 (1954)[17] and the legislative purpose behind the passage of Title VII.

Under the district court's 1971 remedy, there would still be one White local, two Black locals, and one Mexican-American local in Galveston, Texas. A Black man seeking longshore employment under those conditions might make the same wages as the White or Mexican-

17. As noted in the Fifth Circuit's Opinion, the Supreme Court subsequently summarily decided a series of cases in which it held that racially separate facilities were inherently unconstitutional; the Court came to those decisions without regard to any evidence of material equality. See, e.g., *New Orleans City Park Improvement Ass'n v. Detiege,* 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46, aff'g 5 Cir. 1958, 252 F.2d 122 (segregated parks). *Gayle v. Browder,* 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, aff'g *Browder v. Gayle,* M.D. Ala. 1956, 142 F.Supp. 707 (segregated sectioning of buses); *Mayor and City Council of Baltimore v. Dawson,* 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774, aff'g *Dawson v. Mayor and City Council of Baltimore,* 4 Cir. 1955, 220 F.2d 386 (segregated beaches).

American, but he would still be faced with lawfully sanctioned segregation. Since a Black individual might not want to work in a segregated local and would not be hired by one of the non-Black locals because of his color, he would, in essence, be deprived of employment opportunity.

The petitioner argues that, on remand, the district court made extensive findings that Local 1576 never violated Title VII and never discriminated against anyone. These findings are contrary to the findings of the district court in its 1971 opinion, and pursuant to the prior mandate of the Fifth Circuit in 1975, should not have been made. The Fifth Circuit ordered the district court to merge all the locals in each port in Texas and, contrary to the mandate, the district court heard additional evidence and made additional findings of facts which were not authorized by the Fifth Circuit. Unless the Fifth Circuit's decision in 1975 was erroneous, the findings of fact of the district court in 1979 are clearly immaterial to this appeal. Therefore, the district court's previous findings that "membership of *each* [longshoremen's] local union [within the state of Texas] is totally segregated on the basis of race or national origin," 334 F.Supp. at 978, and the evidence that even though Local 1576 had 140 members in 1971, with no Black members, should be controlling (Emphasis supplied.)

Furthermore, the petitioner argues throughout its brief that it never intentionally discriminated against anyone. Title VII is not concerned with the employer's or union's "good intent or absence of discriminatory intent" for "Congress directed the thrust of the Act to the conse-

quence of employment practices, not simply the motivation," *Griggs v. Duke Power Co., supra; Albemarle Paper Co. v. Moody, supra; Teamsters v. United States, supra.*[18]

CONCLUSION

The petition for writ of certiorari of Local 1576, International Longshoremen's Association, AFL-CIO, to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 13, 1980 should be denied.

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18. *See also Watson v. City of Memphis*, 373 U.S. 526, 536 (1963); *Wright v. Council of Emporia*, 407 U.S. 451, 461-62.

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No. 80-1147

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1576, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ordered the merger of four longshoremen locals which were chartered and segregated on the basis of race and national origin where that segregation resulted in the denial of equal working opportunities to black, white, and Mexican-American longshoremen.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 623 F.2d 1054. The opinion of the district court (Pet. App. 13a-21a) is unreported. The prior opinion of the court of appeals (Pet. App. 23a-37a) is reported at 511 F.2d 273, and this Court's denial of the petition for a writ of certiorari in the

first appeal (Pet. App. 22a) is reported at 423 U.S. 994. The original opinion of the district court (Pet. App. 38a-49a) is reported at 334 F. Supp. 976.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1980. On October 30, 1980, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including January 10, 1981. The petition was filed on January 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1969, the Attorney General filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*,[1] against the International Longshoremen's Association (ILA), the South Atlantic and Gulf Coast District of the ILA, and 37 ILA-chartered locals that represent longshoremen and warehousemen along the Texas Gulf Coast. The Attorney General alleged that the defendants were engaged in a pattern or practice of discrimination on grounds of race and national origin by maintaining local unions, hiring halls, and work gangs that were classified and segregated on the basis of race and national origin, resulting in the denial of equal employment opportunities to black and Mexican-American longshoremen.

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[1] In 1972, the Equal Employment Opportunity Commission was substituted as plaintiff, pursuant to Section 707(d) of Title VII, 42 U.S.C. 2000e-6(d).

After a lengthy trial, the district court, on November 12, 1971, issued a memorandum in which it made various findings of fact and concluded that the defendants had violated Title VII of the Civil Rights Act of 1964. The court found that "[o]f the thirty-seven local unions which are party Defendants, sixteen locals were for White longshoremen and have no Negro members, and nineteen were for Negro longshoremen and have no White members, and two locals are composed predominantly of Mexican-American longshoremen" (Pet. App. 40a). The court stated (*id.* at 41a):

> It has been stipulated that the I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their merger, or to charter integrated locals since the passage of the Civil Rights Act.

In addition to those findings regarding the segregation of the ILA locals along the Texas Gulf Coast generally, the district court also made detailed findings of discrimination in Galveston resulting from jurisdictional limitations in the charter of petitioner Local 1576 (Pet. App. 47a). The court found similar discriminatory effects resulting from the fact that the jurisdiction of Local 329, a black local in Galveston, was limited by its charter from the ILA to four stevedoring companies, which had declining business. "The problems caused by this situation would not exist," the district court concluded, "if all longshoremen at the port of Galveston belonged to one local" (Pet. App. 48a).

From all of this, the district court's "basic finding" was that the defendant ILA and its district and locals "have chartered and still maintain locals on a segregated basis," that the work allocation rules among the segregated locals "deprive[d] longshoremen, be they Black or White, Anglo, Mexican-American or Negro, [of] equal working opportunities," and that "this will be a continuing violation in the future" (Pet. App. 48a). The district court nevertheless declined to order that the locals be merged, as the government had requested. The court did, however, enter an interim decree (Appendix to the Petition for a Writ of Certiorari (No. 75-356, 1975 Term) at 15a-26a) requiring the abolition of the separate hiring halls maintained by the locals and the establishment of a common hiring hall on a port-by-port basis. Under this decree, the hiring hall maintained by petitioner Local 1576 was to be merged with those of Local 307, the white local, and Locals 329 and 851, whose members were black. *Id.* at 16a. The decree also required the local unions that were ordered to operate a common hiring hall—which included petitioner and the other three locals in Galveston—to adopt a common seniority system (*ibid.*; see also Pet. App. 27a). With regard to Galveston, where the court had specifically found discriminatory effects resulting from the existence of segregated locals, the court also ordered that no limitations be placed on the stevedoring companies for which a longshoreman could work (*id.* at 24a). The effect would have been to lift the provision in petitioner's charter limiting its jurisdiction to bananas and green fruit work, as well as the jurisdictional restriction in the charter of one of the black locals, discussed above. The district court appointed an arbitrator to work out the details

of the interim decree, which were then to be incorporated in a final decree.

3. The EEOC [2] appealed from the district court's order declining to require a merger of the locals, and the court of appeals reversed. The majority observed that the lower court had "specifically found that 'the Government has discharged * * * [its] burden * * * [of showing] that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working opportunities, because of their race or national origin' " (Pet. App. 36a, quoting *id.* at 45a). In these circumstances, the majority concluded (*id.* at 37a), merger of the locals in each port was required.[3]

4. The ILA, the South Atlantic and Gulf Coast District of the ILA, and 31 locals in Texas chartered by the ILA—including petitioner Local 1576—petitioned for a writ of certiorari to review the judgment of the Fifth Circuit. See Petition for a Writ of Certiorari (No. 75-356, 1975 Term) at 1 n.1. The ILA, the District, and the locals acknowledged in the petition that in Brownsville and Galveston, "the Government did prove instances of arguably discriminatory practices that the District Court later said * * * were indicative of the inequities that can result from segregated locals" (Petition for a Writ of Certiorari (No. 75-356, 1975 Term) at 12); but they

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[2] See note 1, *supra*.

[3] Judge Goldberg concluded (Pet. App. 29a-35a) that the maintenance of segregated local unions constituted, in effect, a per se violation of Section 703(c)(2) of the Act, 42 U.S.C. 2000e-2(c)(2), requiring merger of the locals. Judges Thornberry and Godbold did not reach this question, finding that, in this case, the existence of the segregated locals had a discriminatory effect on employment practices and that merger was therefore required (Pet. App. 36a-37a).

argued that the district court had adequately cured the discrimination in those cities by means other than ordering merger of the locals—*i.e.*, by ordering merger of the hiring halls and seniority lists (*ibid.*; see also *id.* at 13-15, 17, 26). Accordingly, they argued (*id.* at 21-29), the court of appeals erred in ordering merger of the locals in those cities and elsewhere. This Court denied certiorari (Pet. App. 22a).

5. Although the Fifth Circuit had held that merger of the segregated locals in each port was required, the district court, on remand, nonetheless concluded that petitioner Local 1576 should be excluded from the merger order (Pet. App. 13a-20a). In arriving at this conclusion, the court took note of the limited jurisdiction of Local 1576—the loading and unloading of bananas and green fruit—as compared to the general jurisdiction of the other locals. The court also observed that petitioner had not discriminated against members of any racial group (*id.* at 16a; see also *id.* at 20a), although it acknowledged at the same time the "tradition in Galveston locals that members of each race are expected to seek work only with the local whose membership is composed of that race" (*id.* at 16a).

The court was influenced as well by the fact that petitioner maintained a seniority system that differed in some respects from those of the other three locals. Although the court concluded that merger of all four locals would be "acceptable" if the merged local would grant a year's seniority to any longshoreman who qualified in his own local during that year, the three other locals refused to agree to that proposition, apparently because petitioner's relatively more liberal seniority rules might favor its members at the expense of members of the other three locals. *Id.* at 18a. Because of this "attitude" on the part of the other locals, the district court declined to order the merger

of petitioner with the other three locals.[4] But the district court went beyond merely excluding petitioner from the merger order; it ordered petitioner removed as a defendant in the case and granted partial summary judgment in its favor, pursuant to Fed. R. Civ. P. 54(b).

6. The court of appeals again reversed (Pet. App. 1a-12a), finding that the law of the case established on the prior appeal required inclusion of petitioner in the merger of the locals in Galveston. The court found "no question that [the] court's prior mandate [requiring merger] comprehended the Galveston locals. The district court opinion singled out [petitioner] and [Local] 329 as prime examples of locals whose members had been denied equal employment opportunity due to segregation. 334 F. Supp. at 980-981. Moreover, its interlocutory order requiring merger of hiring halls referred specifically to Galveston Locals 307, 329, 851, and 1576" (Pet. App. 8a). Nor did the court of appeals find a departure from the law of the case warranted because of new evidence that petitioner is no longer segregated or that

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[4] The other three locals had initially opposed the inclusion of petitioner in the merger order, as had the ILA and the South Atlantic and Gulf Coast District of the ILA. The three locals subsequently reversed their position because of unidentified "changed circumstances" (Pet. App. 17a). There is some reason to believe that the "changed circumstances" may have been an increase in the volume of work within petitioner's jurisdiction. *Id.* at 16a, 18a-19a; see also Pet. 6, 8, 10. An increase in employment prospects might also explain petitioner's present resistance to merger, even though it had previously sought to have the jurisdictional limits in its charter lifted (Pet. App. 47a). This district court, too, appears to have been influenced by this consideration (*id.* at 18a-19a).

its segregated existence does not deprive any group of equal employment opportunity (Pet. App. 9a-10a):

> The evidence demonstrated the contrary. [Petitioner] Local 1576, still chartered as a union for Mexican-Americans, remains functionally segregated * * *. Based on evidence presented at the September 1979 hearing on remand, the district court specifically found that this practice has not changed; few black longshoremen obtain employment through either white Local 307 or [petitioner] Mexican-American Local 1576, and few white or Mexican-American longshoremen obtain employment through the black locals (329 and 851).

Accordingly, the court of appeals concluded that "[a]lthough the trial court may have been correct in stating that [petitioner] Local 1576 never *actively* discriminated against members of any racial group, the fact remains that as one of four segregated Galveston longshoremen's locals, [petitioner] Local 1576 has been part of a system which operates to discriminate against people because of race and national origin" (Pet. App. 10a; emphasis added).

Nor, in the court of appeals' view (Pet. App. 10a-12a), did the possible complexities of meshing petitioner's seniority list with those of the other Galveston locals excuse the inclusion of petitioner in the merger. The court reasoned that, as a factual matter, petitioner's members may not be disadvantaged by the merger, even if the merger were to take place under the seniority standards utilized by the other locals. But, in any event, the court concluded that the possibility that some blacks and whites might benefit at the expense of some Mexican-Americans did not justify permitting the discrimination resulting from segre-

gated locals to continue. The case was remanded to the district court for implementation of the requirement that petitioner be included in the merger (Pet. App. 50a-51a).

ARGUMENT

The court of appeals properly rejected petitioner's argument that it, alone among all of the Texas Gulf Coast locals that were concededly chartered and maintained on a segregated basis by the ILA, should be excused from the port-by-port merger of the locals ordered by the court of appeals to eliminate the discriminatory effects that segregation had on employment opportunities in Galveston and elsewhere. The decision below, which seeks to bring this 12-year-old litigation to a close, does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. Section 703(c)(2) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(c)(2), provides that it shall be an unlawful employment practice for a labor organization to "limit, segregate, or classify its membership * * * or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee * * * because of such individual's race, color * * * or national origin." The district court, in its initial opinion, rejected the argument that the ILA's segregated locals constituted a per se violation of this section, but it concluded that the government had carried the burden of showing, in the circumstances of this case, "that the maintenance of segregated locals constitutes a pattern or practice depriving individuals of working oppor-

tunities, because of their race or national origin" (Pet. App. 45a). The court also found that "this will be a continuing violation in the future" (*id.* at 48a).

In view of these findings, the court of appeals properly ordered the merger of the segregated locals in each port to eliminate the discriminatory effects of the segregated locals. This conclusion is consistent with the decision of every other federal court that has considered the status of racially segregated local unions. See *Bailey* v. *Ryan Stevedoring Co.*, 528 F.2d 551, 556-557 (5th Cir. 1976), cert. denied, 429 U.S. 1052 (1977), on motions for relief from judgment, 613 F.2d 588 (5th Cir. 1980), cert. denied, No. 80-569 (Mar. 2, 1981); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 457-458 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); *Long* v. *Georgia Kraft Co.*, 455 F.2d 331 (5th Cir. 1972); *Rock* v. *Norfolk & Western Ry.*, 473 F.2d 1344, 1348-1350 (4th Cir.), cert. denied, 412 U.S. 933 (1973); *United States* v. *International Longshoremen's Association*, 460 F.2d 497 (4th Cir.), cert. denied, 409 U.S. 1007 (1972); *Williams* v. *New Orleans Steamship Association*, 466 F. Supp. 662, 678-680 (E.D. La. 1979); *English* v. *Seaboard Coast Line R.R.*, 4 Empl. Prac. Dec. ¶ 7645 (S.D. Ga. 1972); *United States* v. *Chesapeake & Ohio Ry.*, 3 Empl. Prac. Dec. ¶ 8331 (E.D. Va. 1971); *Hicks* v. *Crown Zellerbach Corp.*, 310 F. Supp. 536 (E.D. La. 1970); *United States* v. *Local 189, United Papermakers & Paperworkers*, 301 F. Supp. 906, 919 (E.D. La.), aff'd, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); see also *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (locals segregated by sex).[5]

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[5] Petitioner contends (Pet. 21-22) that the decision below conflicts with *EEOC* v. *Local 14, International Union of Operating Engineers*, 553 F.2d 251 (2d Cir. 1977), in which,

2. Petitioner seeks to avoid the uniform precedent supporting merger of segregated locals by arguing (Pet. 4, 8, 10, 12, 14, 19, 20, 24) that it was not involved in a violation of Title VII and therefore should be excused from merging with the other Galveston locals. This assertion is flatly inconsistent with the record and the opinions of the court below and departs from petitioner's own past position in this case.

The district court found in its initial decision (Pet. App. 41a), and petitioner does not dispute, that the ILA chartered and maintained all of its Texas Gulf Coast locals on the basis of race. Petitioner, in par-

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petitioner asserts, the Second Circuit reversed a remedial order requiring that two separate locals merge their hiring halls and adopted a rule requiring that Title VII relief not interfere with a defendant's business operations any more than necessary. However, *Local 14* involved two predominantly white locals, each of which was alleged to have excluded minorities, not, as here, local unions that were concededly segregated according to race and national origin. Moreover, the court of appeals reversed not, as petitioner intimates (Pet. 21), because of particular dissatisfaction with the order requiring merger of the hiring halls—indeed that was but one of 14 elements of the relief cited by the court of appeals (553 F.2d at 257). Rather, the court of appeals reversed because the district court had not held an evidentiary hearing on the question of relief, as was contemplated by the pretrial order, in order to consider what impact the order might have on the industry and the unions (*ibid.*). The court of appeals did not hold that merger of the hiring halls would be improper if that were ordered following the evidentiary hearing. In the present case, the district court held three evidentiary hearings on the motion to exclude petitioner from the merger order, and it considered at those hearings the reasons advanced by petitioner for different treatment of the banana and green fruit work. See Brief of Amicus Local 851, ILA at 7-8. This case therefore presents no conflict with *Local 14*.

ticular, had no black members and only 20 white members among its membership of 140 in 1971, and only 3 black and 30 white members among its greatly expanded membership of 250 in 1977 (Sept. 1979 Tr. 22-24, 73, 150; Government's Summaries of Depositions filed July 9, 1970, at 51-52). Moreover, as the court of appeals observed, the practice of referring employees out of hiring halls maintained by the segregated locals had not changed by 1979, and "few black longshoremen obtain employment through either white Local 307 or [petitioner] Mexican-American Local 1576, and few white or Mexican-American longshoremen obtain employment through the black locals (329 and 851)" (Pet. App. 9a-10a).[6] Based on this evidence, the court of appeals correctly observed that "Local 1576, still chartered as a union for Mexican-Americans, remains functionally segregated" (Pet. App. 9a).

Moreover, when the district court rendered its initial decision, there was relatively less demand for the banana and green fruit work to which petitioner's jurisdiction was limited by the ILA, and the court accordingly found (Pet. App. 47a) "no question that individuals belonging to [petitioner] Local 1576 have been denied an opportunity to work as longshoremen, because of the restrictions on their charter" (*ibid.*). The district court found a parallel situation with respect to the predominantly black Local 329, whose members' opportunities were restricted because of a charter provision limiting its jurisdiction to four stevedoring companies that had declining business.

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[6] The court of appeals noted in this regard the following observation by the district court (Pet. App. 10a): "I don't doubt * * * at all that when there are some Blacks there in 1576 * * * the Mexican-Americans have the first crack at it. If I made any other findings, I would be a liar."

The court specifically concluded that "[t]he problems caused by this situation would not exist if all longshoremen at the port of Galveston belonged to one local" (Pet. App. 48a).

It was to eliminate these very effects of the seggregated locals in Galveston that the district court ordered the lifting of all jurisdictional restrictions in the charters of the Galveston locals and the merging of the hiring halls maintained by all four locals there, including petitioner, with a concomitant creation of a common seniority list. In their petition for a writ of certiorari filed in 1975, petitioner, the ILA, and other locals did not challenge—indeed they acknowledged (No. 75-356, at 12)—these findings of discrimination in Galveston; instead they argued that these effects would be adequately remedied by the district court's order that hiring halls and seniority lists be merged there.

Despite the abundant evidence and past findings of discrimination resulting from segregated locals in Galveston, and petitioner's own past acknowledgement of specific discriminatory effects of that segregation, petitioner now argues that it was not involved in a violation of Title VII and should not be included in the merger. Petitioner apparently relies on observations in the district court's opinion, after remand, that petitioner had not discriminated against members of any racial group. See Pet. App. 16a, 20a. But, in context, the court of appeals properly read these statements to constitute merely a conclusion that petitioner had "never *actively* discriminated against members of any racial group" (Pet. App. 10a; emphasis added). The district court, in making the observations relied upon by petitioner, did not disavow any of its earlier findings regarding the

effects of segregated locals in Galveston, particularly as they related to petitioner and Local 329 (Pet. App. 16a). To the contrary, in the same opinion, the district court reiterated its finding that there has been a "tradition among the Galveston locals that members of each race are expected to seek work only with the local whose membership is composed of that race." This tradition would, at the very least, "*tend* to deprive * * * individual[s] of employment opportunities" (42 U.S.C. 2000e-2(c)(2); emphasis added), even if petitioner did not discriminate against those individuals who actually sought membership in or referrals through petitioner, because the traditional practice would have the effect of steering individuals to locals comprised of members of their own race and, as a result, reducing the flow of black and white applicants to petitioner. Cf. *Teamsters* v. *United States*, 431 U.S. 324, 362-371 (1977). Thus, as the court of appeals concluded, "the fact remains that as one of four segregated Galveston longshoremen's locals, [petitioner] has been part of a system which operates to discriminate against people because of race and national origin" (Pet. App. 10a).

Petitioner cannot be heard to deny all complicity in this pattern or practice of discrimination which the district court expressly found in 1971 would continue in the future unless corrected. Petitioner was concededly chartered and maintained by its international union, the ILA, on a segregated basis.[7] Moreover, 1977 statistics showed that only three of its 240 members were black and that the percentage of white workers in its ranks had actually declined since 1971.

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[7] This alone distinguishes *Milliken* v. *Bradley*, 418 U.S. 717 (1974), upon which petitioner relies (Pet. 19-20). See 418 U.S. at 745.

The traditional practice in Galveston was to reserve banana and green fruit work for petitioner, which is comprised predominantly of Mexican-Americans. The inevitable correlative effect of the traditional practice is the exclusion of blacks (and, to a lesser extent, whites) from banana and green fruit work, particularly in these times of relative plenty of such work. In these circumstances, the court of appeals plainly did not err in ordering that petitioner be included in the Galveston merger.[8]

3. Petitioner contends (Pet. 14-15) that the court of appeals' decision requiring that petitioner be merged with the other Galveston locals and, as a consequence, requiring the merger of the locals' seniority systems, is inconsistent with this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977). Petitioner argues that, under *Teamsters*, a seniority system cannot be found unlawful unless it was established or maintained with the intent to discriminate. Because, it is contended, petitioner did not violate Title VII and there is no evidence or finding that its separate seniority system based on seniority in banana handling was established or maintained with an intent to discriminate, the violation of Title VII by other parties should have been remedied by means

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[8] Petitioner contends (Pet. 7, 9, 12-13, 18) that the basis of the district court's finding of discrimination in Galveston was solely the division of the general longshore work on a 50-50 basis between black Local 851 and white Local 307. This contention is in error. The district court specifically found violations as well in the jurisdictional limitations applicable to petitioner and black Local 329, which barred them from sharing in the 50-50 division of general longshore work. Moreover, we fail to understand how, if a 50-50 division of work violates Title VII, the allocation of 100% of the banana and green fruit work to petitioner, which was also segregated, would not similarly violate Title VII.

other than merging petitioner's seniority system with those of the other locals. That remedial order, petitioner maintains, would work to the disadvantage of its members. This argument fails for a number of reasons.

a. The court of appeals did not, contrary to petitioner's apparent suggestion, order that the seniority of petitioner's members in the merged local be determined by application of the seniority standards utilized by the other three locals, rather than the relatively more liberal standards utilized by petitioner (Pet. App. 10a-12a, 50a-51a). Accordingly, the manner in which the seniority lists will be meshed remains open for consideration on remand. There is no reason to believe that the district court's options must be limited to those which may disproportionately favor or disfavor petitioner's members.[9] The court, in the

[9] The district court, on remand from the first court of appeals decision, perceived two different ways in which the locals could be merged under a uniform seniority system. The merged local could apply the standards utilized by the other three locals, which contained five-year steps and required that members work 700 hours in a year to earn seniority for that year. Alternatively, the merged local could grant a year's seniority to any member who had qualified in that year under the seniority plan in his own local. Under the latter approach, applying petitioner's seniority plan, petitioner's members would be credited with seniority in one-year, not five-year intervals, and would be credited with seniority in any year in which they worked 300 hours. The district court found that a uniform seniority system utilizing the latter approach would be acceptable, but rejected it solely because of objections of the other locals. Pet. App. 18a-19a. Objections of the other three segregated locals to a merger plan on the ground that their members might be disadvantaged in some fashion is, in itself, hardly a reason for rejecting this alternative. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 774-779

exercise of its equitable discretion, may be able to choose a sound middle course. Moreover, even if the district court were to apply the seniority standards of the other three locals, rather than those of petitioner, the court of appeals concluded (Pet. App. 11a) after reviewing the evidence that the district court's fear that such a merger would disadvantage petitioner's members may well have been unwarranted.[10] Accordingly, petitioner's objections to the merger order based on an asserted disadvantage to its members are both speculative and premature. There will be time enough to consider this claim if the district court enters a final merger order that unfairly disadvantages petitioner's members.

b. In any event, petitioner's argument that the decision below is inconsistent with *Teamsters* is expressly made dependent on its assertion that it was not involved in a violation of Title VII, because it argues that an alteration of its seniority system is not necessary to put victims of discrimination in their rightful place. See Pet. 14-15. As we have shown above, however (see pages 11-15, *supra*), the record and decisions below make clear that petitioner has been part of a system of segregated locals that has

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(1976). Nor, for the same reason, is the fact that some of petitioner's members may be disadvantaged in terms of seniority as a result of merging the seniority lists sufficient reason to deny that relief.

[10] The court read the record (Pet. App. 11a) to suggest that many of petitioner's members may be able to satisfy the higher standards utilized by the other locals (see note 9, *supra*) and that many black longshoremen would have less seniority than petitioner's members regardless of the standards utilized.

operated to discriminate against individuals because of race or national origin, in violation of Title VII.[11]

Moreover, the merger of seniority lists is necessary to grant the longshoremen in the four locals the seniority they would have attained if there had been a single local in the port of Galveston with employment opportunities equally available to all—to put the members of the separate Galveston locals in their "rightful place." [12] Petitioner and its members could

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[11] Put another way, although petitioner's seniority plan is not unlawful when considered in isolation, the fact that it is *maintained* separately from the seniority plans of the other locals (and therefore on a segregated basis) is unlawful for the same reasons that segregation of the locals themselves is unlawful under 42 U.S.C. 2000e-2(c)(2). Merger of the seniority lists therefore remedies the vice of segregation.

[12] Petitioner's assertion (Pet. 14-15) of a conflict with *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979), therefore is without merit. In *Sledge*, the court of appeals expressly approved the award of seniority relief to individual black employees who were the victims of discrimination, in accordance with the holding in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). See 588 F.2d at 643-644. In the portion of the *Sledge* opinion relied upon by petitioner, the court simply disapproved a provision permitting any present black employee who was to be laid off to "bump" a white employee from a job he already held if the black employee had greater plant seniority, even though the existing and lawful seniority plan provided for layoffs according to departmental seniority. The merger of the locals ordered by the court of appeals in the present case will not result in the "bumping" of employees from existing positions. Rather, it will create an integrated, "rightful place" seniority list to be used in future hiring and referrals from a common hiring hall. Moreover, here, unlike in *Sledge*, the separate nature of petitioner's seniority list was unlawful because segregation of the local was itself unlawful. See note 11, *supra*.

have no valid objection to the alteration of their expectations regarding seniority that might result from such "rightful place" relief even if, contrary to the evidence and findings in this case, petitioner had not been involved in a violation of Title VII. *Teamsters* v. *United States*, *supra*, 431 U.S. at 345-348; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

c. Finally, we note that creation of a common seniority list and hiring hall for the four Galveston locals, including petitioner, was an integral part of the relief ordered by the district court in its initial decree to remedy the violations of Title VII it found in Galveston. Pet. App. 27a; Appendix to the Petition for a Writ of Certiorari (No. 75-356, 1975 Term) at 15a-18a. The district court later retreated from ordering that relief only because the other three locals objected to one manner of creating a unified seniority list and because the court concluded that petitioner had not discriminated in its membership and referral policies, when considered in isolation. As we have explained (see pages 11-15, 16 note 9, *supra*), neither of these grounds was a valid basis for excusing petitioner from the merger, much less dismissing it as a party defendant. Accordingly, the merger of seniority lists that will result from the merger of locals ordered by the court of appeals is fully consistent with the relief ordered by the district court at the time it concluded, correctly, that Title VII had been violated by maintenance of segregated locals. [18]

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[18] For this reason, petitioner errs in arguing (Pet. 23-26) that the court of appeals merely "substitute[d] its judgment" for that of the district court about the appropriate relief and thereby violated principles governing the allocation of

4. Petitioner also errs in arguing (Pet. 21-22) that the court of appeals' order requiring merger of the locals was improper because it would alter the established business practice of having a separate local for banana handlers. In the first place, this argument depends, as does petitioner's seniority argument, *supra*, on the underlying assertion that the only Title VII violation in Galveston concerned the division of work among the other three locals and did not involve petitioner. See Pet 22. As we have explained, this assertion is incorrect.

Moreover, at an earlier stage in this litigation, petitioner itself sought to have the jurisdictional limitations in its charter lifted so that it could compete for other longshore work (Pet. App. 47a). This substantially undercuts its current argument (Pet. 22), now that banana work has increased (Pet. 8), that a specialized local handling only banana work is essential. The district court's initial decree ordering the creation of a common hiring hall and seniority list

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authority between the two courts. Contrary to petitioner's contention, the court of appeals found that the district court had committed errors of law, not fact, in finding that petitioner was not a party to a violation of Title VII and in excluding petitioner from a merger of seniority lists. Once these errors of law were corrected, the relief ordered by the court of appeals—merger of the segregated locals and, as an incident thereto, merger of seniority lists—followed from the court of appeals' own review of the record and the district court's prior findings and from the application of settled legal principles. In any event, petitioner's fact-bound argument that the district court's findings of fact (assuming the district court's conclusions could be so characterized) were not clearly erroneous and should not have been disturbed by the court of appeals does not warrant review by this Court.

would have eliminated the specialized unit of banana handlers petitioner now seeks, and yet petitioner did not raise this argument against the court of appeals' merger order in its petition for certiorari seeking review of that order. And, finally, the supposedly specialized nature of the banana work was not the principal basis on which the district court, on remand, excluded petitioner from the merger; exclusion was ordered because of difficulties in merging seniority lists and because of the district court's mistaken belief that petitioner did not participate in a violation of Title VII. The district court did note (Pet. App. 19a) the "possibility" that the banana industry might take its business to another port if petitioner's members disappear from the banana trade. But, under the integrated seniority and hiring hall to be maintained by the merged local, many of petitioner's members would continue to be assigned to work for the stevedoring company handling bananas, and therefore would not disappear from the trade. To the extent special measures are needed to protect the banana trade and keep it in Galveston, the merged local would have every incentive to accommodate these needs on behalf of its membership at large. Speculation about the impact on the banana trade therefore does not warrant the exclusion of petitioner from the merger order.[14]

5. Petitioner's argument (Pet. 16-19) that the merger order conflicts with federal labor policy is frivolous. "Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority," *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 66

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[14] In any event, as amicus Local 851 points out (Br. 7-8), the record establishes that banana work is not particularly skilled or specialized.

(1975); see also *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 202-204 (1944), and merger of segregated local unions is fully consistent with the National Labor Relations Act. *NLRB* v. *Local No. 106, Glass Bottle Blowers Association*, 520 F.2d 693 (6th Cir. 1975);[15] *Chicago Federation of Musicians, Local No. 10* v. *American Federation of Musicians*, 57 L.R.R.M. 2227 (N.D. Ill. 1964); *Musicians' Protective Union Local 274* v. *American Federation of Musicians*, 329 F. Supp. 1226 (E.D. Pa. 1971).[16]

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[15] The Sixth Circuit stated in *Glass Bottle Blowers* (520 F.2d at 697):

> The rights of minorities are not forfeited by the merger of the Local Unions. These rights are protected by the duty imposed on the bargaining agent to represent fairly all employees in the unit.

[16] This argument, like petitioner's other contentions, is premised on its mistaken assertion that it was not a party to a violation of Title VII (see Pet. 17-18), and must therefore be rejected for this reason as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1576,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*:

§ 703 (h) 7

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The district court focused on the legality of the conduct of petitioner, Local 1576, in the proceedings on remand from the Fifth Circuit's first decision. At the conclusion of those proceedings, the district court found that Local 1576 had not committed any discriminatory act and had not taken part in the discriminatory work allocation rules that were used by the other ILA locals in the case—the work allocation rules (generally the so-called "50-50 rule") being the sole predicate for the Title VII violation found as to the other locals. Respondents in their briefs in opposition to the petition for certiorari seek to create the misleading impression that the district court found to the contrary by quoting findings, made in 1971, which applied to the other locals in the case but not to Local 1576.

The 1971 findings were made in a proceeding that encompassed 37 local unions. Out of the 37 local unions, Local 1576 was *the only one* that did not operate under some variant of the offending work-division rule. The court found that Local 1576 had a work jurisdiction that was limited to one category of cargo, and that it did not share that work with any other local. Each of the other locals was party to some arrangement for dividing identical work within a single bargaining unit between local unions that were alike in every respect except the race or national origin of their members. The most common work-division practice was to divide the available work 50-50 between black and white locals in the same port; the method for achieving that division was to allow the white local to load or unload one end of each ship, while the black local loaded or unloaded the other end of the same ship. The core of the district court's findings are addressed to that practice, concluding that dividing the work according to a fixed percentage without making allowance for differences in the number of longshoremen of each race seeking work, had the effect of denying employment opportunity based upon race or national origin.

Pet. App. 42a-45a, 48a. Because Local 1576 was found to be part of no such proportional work allocation, the district court's findings on this issue did not apply to Local 1576. See Pet. App. 48a.[1] In reviewing the district court's 1971 decision, the Fifth Circuit affirmed the holding that the work-allocation rules—to which Local 1576 had never been a party—constituted a violation of Title VII. The Fifth Circuit found no other violation.[2]

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[1] Respondent EEOC asserts, and respondents Locals 307 and Local 851 suggest, that the district court found that the existence of the specialized work jurisdiction of Local 1576 was a violation of Title VII. Brief of Respondent Equal Employment Opportunity Commission at 3, 12, 15 & n.8 (hereinafter "EEOC Br."); Brief of Respondent Local 851, at 10 n.8, 28 (hereinafter "Local 851 Br."); Brief of Respondent Local 307 at 5 (hereinafter "Local 307 Br."). All that the district court found on this point was "that individuals belonging to Local 1576 have been denied an opportunity to work as longshoremen, *because of restrictions on their charter*," Pet. App. 47a (emphasis added). (It is undisputed that the Local 1576 charter contains no restrictions pertaining to race or national origin.) The district court has never found (and there has been no evidence) that the members of Local 1576 were denied work opportunity because of their race or national origin or that the separate banana jurisdiction was created with intent to discriminate against any group. Providing for referrals to banana work through a separate local union, in a separate bargaining unit, is consistent with industry practice and National Labor Relations Board precedent, and serves legitimate interests of efficiency in unloading the cargo. Pet. at 5-6.

In addition, the creation and maintenance of a separate local union for banana jurisdiction does not deny work opportunity to anyone. Anyone who wants to work in longshoring can work through any of the locals, regardless of membership or nonmembership. See *infra*, at page 4. In fact, the record shows that a number of years ago, when Local 1576 asked the ILA about enlarging its charter, it was told that if there was too little banana work, and its members wanted access to other work, they should apply for work at the hiring halls of the other local unions. The record shows that members of Local 1576 have obtained general-cargo work through the hiring hall of Local 307. Pet. App. 47a.

[2] Respondent EEOC considers it significant that in the petition for certiorari filed in 1975 on behalf of all the locals that were then contesting the EEOC action, no separate argument was made to exempt Local 1576 from the remedy of merger that the Fifth Cir-

2. Respondents try to divert attention away from the fact that Local 1576 has not been found to have been involved in any act of discrimination, by constant references to "segregation" and the "tradition" in Galveston that longshoremen sought work from the local whose membership matched their own race.[3] But neither "segregation"—which in the case of Local 1576 means only that it is "predominantly" Mexican-American[4]—nor this

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cuit held mandatory whenever a denial of employment opportunity was found. EEOC Br. at 13, 21. In the procedural context of that petition, no such significance can be found. Based upon the 1971 findings, the district court entered an "Interlocutory Decree," denying the remedy of merger in each port, instead ordering the creation of common hiring halls and seniority lists. The Government filed an interlocutory appeal from only that part of the Interlocutory Decree that denied merger. The Galveston local unions did not file a cross-appeal from the inclusion of Local 1576 in the common hiring hall required by the Interlocutory Decree, but instead filed a motion in the district court asking that the Decree be modified to exclude Local 1576 from the common hiring hall. (That motion set in train the events that produced the 1979 Order at issue here.) Having taken no cross-appeal nor having presented any issue focusing on Local 1576 to the court of appeals, the 1975 petitioners could not have raised such an issue in their petition for certiorari.

[3] EEOC Br. at 9-10, 12-14, 15 n. 8, 18 nn. 11 & 12, 19, 21; Local 851 Br. at 26-28.

[4] Pet. App. 40a. Respondents make repeated assertions that it was "stipulated" or "conceded" that all the ILA locals were "chartered and maintained on the basis of race or national origin," relying on the district court's description of a stipulation that was filed July 13, 1970, at the beginning of the 1971 trial. EEOC Br. at 3, 9, 11 & n. 6, 12, 14; Local 851 Br. at 10 n. 8, 17, 20; Local 307 Br. at 4-5; *see* Pet. App. 40a, 41a. Insofar as that stipulation applies to Local 1576 it is entitled to little, if any, evidentiary weight. It is, first, not a stipulation that its contents are fact, but a stipulation that purports to show what the president of Local 1576 would testify about certain matters, including the chartering of Local 1576 in 1937. The president of Local 1576 testified at trial that his experience with the ILA and Local 1576 began in 1956; it is therefore clear that he had no knowledge of the original chartering of the local. (Inasmuch as ¶ 35 of the Stipulation stated that any party remained free to "offer evidence which enlarges or explains the

"tradition" supply a basis for finding any conduct by Local 1576 that violates Title VII or that justifies the relief ordered by the court of appeals.

There was no evidence that Local 1576 had taken any action to encourage or preserve the tradition. Pet. at 6-7. Moreover, the necessary implication of the district court's findings is that the actions of Local 1576 have run counter to the tradition. The district court described the tradition, then immediately made the following findings in sequence: Local 1576 never discriminated against anyone; it has black and white members, and either has or has had black and white foremen; Local 1576 has regularly advertised on the radio, in English and Spanish, to obtain additional longshoremen for days when it had extra work. Pet. App. 16a-17a. It is critical to understand in this regard that membership in Local 1576 is not—and by law cannot be—a determinant of who may be assigned work out of the Local 1576 hiring hall. Nonmembers may be assigned such work and are eligible to build up seniority in Local 1576 on the same basis as members. As of 1979, larger numbers of black long-

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matters stipulated or to contradict any matter" at trial, the testimony of the local president that he had no knowledge of part of the contents of the Stipulation leaves the evidentiary status of that portion of the Stipulation in considerable doubt.) Second, the Stipulation on its face is ambiguous, stating not that Local 1576 was chartered as a local "for Mexican-Americans," but that it was chartered in 1937 "with the expectation at that time that the membership . . . would be Mexican-American," although the charter contained no such limitation. Stipulation ¶ 10. In the 1979 hearing, an officer of Local 1576 seemingly contradicted this statement. He testified: "All the original banana charter didn't belong to the Americans of Mexican descent." 79 Tr. 177. Third, even if the Stipulation can be taken as evidence of the intent in 1937, that intent is irrelevant, because the charter became inactive in the 1950s, and was reactivated in 1962. Pet. at 6-7. The record is silent about the intent underlying that event.

The Stipulation says nothing about the local unions having been "maintained" on the basis of race. It appears that the district court's use of that term, Pet. App. 41a, means the same as its finding that the locals were not merged or re-chartered after the effective date of Title VII. *Id.*

shoremen—and a greater proportion of the total—were working through the Local 1576 hiring hall than had chosen to become members of the local. There is no evidence in this case that any person was ever refused work by Local 1576 on account of race or national origin.

3. The EEOC relies on the principles of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Teamsters* v. *United States*, 431 U.S. 324 (1977), to support its argument that it is appropriate to require that Local 1576 be merged into the other locals. EEOC Br. at 13-19. Those decisions command the opposite result, however, and highlight the mistaken premises of the EEOC's argument. *Franks* and *Teamsters* both hold that the object of relief under Title VII is to place victims of discrimination into their "rightful places," that is, the positions they would have occupied in the absence of the discriminatory practice that is found to violate the Act. Under *Franks* constructive seniority relief is available to identifiable victims who applied for a position but were turned down because of race, 424 U.S. at 774-776. *Teamsters* extended that remedy to particular individuals who can satisfy their burden of proof that they would have applied for a job but for knowledge of a "consistently enforced discriminatory policy" that would have made such an application a futile act. 431 U.S. at 364-371.

There are no persons in this case to whom the remedy of constructive seniority in Local 1576 could be awarded under either *Franks* or *Teamsters*. In addition to the express finding that Local 1576 never turned anyone away because of race or national origin, there is no testimony or other evidence in this lengthy record that points to a single individual who was denied work referral or membership by Local 1576 or who claims to have been deterred from applying because of even a subjective belief that Local 1576 would discriminate against him. In *Teamsters*, where the employer had been engaged in "an extended pattern and practice of discrimination" by excluding minority employees from line driver jobs, the Government argued that all minority city drivers

who were qualified as line drivers should be given constructive seniority from their date of hire because a court could presume they would have known of the discrimination and would have been deterred from applying for a line driver job. This Court rejected that argument, holding that no such presumption could substitute for proof "with respect to each specific individual." 331 U.S. at 368-371. The EEOC's argument in this case has even less to support it than the argument that was rejected in *Teamsters*. The EEOC argues that giving *every* longshoreman the right to use all his general-cargo seniority to compete for banana handling work is a necessary remedy. The effect on work referrals through Local 1576 is the same as if all longshoremen, without proof that they ever before had any interest in banana work, were given constructive seniority in Local 1576, retroactive not just to a date when they might have applied for work through Local 1576, but retroactive to their earliest seniority date in any local union in the port. Such a result cannot masquerade as a "rightful place" remedy.

4. Respondents also suggest that merger is necessary to end the "vice of segregation," EEOC Br. at 17-18 & n.11, or that absent merger, Local 1576 will remain "separate but equal," Local 581 Br. at 26-27. If, without a merger, Local 1576 remains predominantly Mexican-American, it will be only because whites and blacks have chosen not to join. The issue here is not access to Local 1576 by whites or blacks; rather, what respondents seek, and what the Fifth Circuit ordered, is the opportunity for whites and blacks who have never had or wanted anything to do with the work of the Local to move ahead of those who have performed the work for years.

For over fifteen years the law has provided every longshoreman in Galveston a right to apply at any local union and be referred for work or accepted as a member without regard to race or national origin. The district court found that Local 1576 has excluded no one on prohibited grounds. Accordingly, if Local 1576 does not have a larger number of white and black longshoremen

as members or holders of seniority, on this record and the findings of the district court the only explanation is that the majority of white and black longshoremen in Galveston have chosen not to apply at Local 1576. Beginning at least two years preceding the 1979 hearing, Local 1576 has had enough banana work available one day a week to make special recruiting efforts; anyone who takes advantage of that opportunity, by working just one day a week, can accumulate seniority credit in Local 1576, while continuing to work and accumulate seniority through another local on other days. Those longshoremen who do so come in on the ground floor, just like everyone else who has acquired seniority in Local 1576. It is apparent from Local 851's Brief that the longshoremen in the other locals are not content with this opportunity, but seek, in effect, to come in at the top of the seniority list and be referred for banana work based upon seniority in general-cargo work, even though they had no prior interest in handling bananas.[5]

5. Local 851 includes an elaborate argument in an effort to show that having a separate seniority system for banana handling, apart from seniority for general-cargo work, is not *bona fide* within the meaning of § 703(h) and *Teamsters* v. *United States*. Local 851 Br. at 14-18. That argument cannot take the place of a judicial finding on the question whether the separate seniority is the result of discriminatory intent. *See* Pet. at 14-15. Moreover, the record shows that the system using banana seniority for banana referrals "applies equally to all races and ethnic groups"; it "locks" no-one into any category, because a longshoreman can work through more

[5] See Local 851 Br. at 16 n. 11, 21. The EEOC's argument, EEOC Br. at 16-17, that Local 1576 is objecting to one particular method for calculating merged seniority credits, is beside the point. The only change in seniority that the Fifth Circuit's decision necessarily requires is that referrals for banana work can no longer be made on the basis of seniority accumulated in banana work alone but must be made on the basis of seniority earned in any local in the port. Pet. App. 10a-12a. It is this change in seniority that violates the rule of *Teamsters*.

than one local and accrue seniority in more than one local at the same time; placing banana handlers (who work for a different employer, in a separate bargaining unit) in a separate seniority unit is "rational, in accord with the industry practice, and consistent with National Labor Relations Board precedents"; and it furthers legitimate interests of business efficiency, Pet. at 5-6; Brief of Amicus Curiae Southern Stevedoring Co. Accordingly it has the same characteristics that this Court found sufficient in *Teamsters* to establish the *bona fides* of the seniority system used by the employer and the union in that case. *See* 431 U.S. at 355-356.

6. Local 851 asserts that the district court did not "give the slightest hint that it could see any adverse changes in the business operations of Southern Stevedoring," the company that employs the longshoremen referred through Local 1576, and argues that there is no record evidence that such changes would occur. Local 851 Br. at 22-23. The EEOC, reading the record correctly, acknowledges both that the Fifth Circuit's decision would put an end to the system that supplies specialized crews of banana handlers to the employer, and also that the district court found that the banana business might move to another port if the members of Local 1576 lose their seniority preference for banana work. EEOC Br. at 20-21. The record contains ample evidence to support both conclusions, primarily in the form of extended testimony by Ben Harris, president of Southern Stevedoring.[6]

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[6] 77 Tr. 97-211. The substance of that testimony is summarized in the Brief of Amicus Curiae Southern Stevedoring Co.

Local 851 also asserts that "many letters and pleas by the Mexican-Americans [were] sent directly to the district court," implying that these *ex parte* communications were the true reason for the ruling. Local 851 Br. at 25-26 n. 16. It should be noted that the record citation Local 851 relies upon for this assertion is a reference to letters from members of Local 329 (one of the black locals), which the district court placed in the docket, 79 Tr. 4, 255, 258-60. The docket list shows that the district court received two letters connected with Local 1576, one of them from the president of Southern Stevedoring; both were filed of record, and copies were

Local 851's argument is apparently based on its belief that the petition misrepresents banana handling as requiring "unusual and unique" skills. Local 851 Br. at 7 & n. 5. The petition makes no such contention, but relies upon Mr. Harris's testimony that Local 1576's efficiency in banana handling depends upon the specialization and teamwork of a core of experienced longshoremen who work together regularly on the same operation. 77 Tr. 125-29. Also, Local 851 asserts that including inexperienced workers in banana gangs does not erode the efficiency of the operation. Local 851 Br. at 8. That assertion is misleading. Ben Harris testified that a *small number* of inexperienced men on a banana crew can be assigned so that they do not disrupt the operation, 77 Tr. 149, but that a crew with more than a small number of inexperienced or occasional banana workers could not achieve the efficiency he gets from Local 1576, 77 Tr. 125, 127-28.

EEOC tries to escape the finding of a merger's likely effect on the employer by arguing that the supporting evidence is not certain but only speculative. It says that "many" of the members of Local 1576 could continue handling bananas and the merged local would have an incentive to make unspecified accommodations to keep the banana trade in Galveston.[7] It is irrelevant that "many" members of Local 1576 may have sufficient seniority in the merged local to continue in banana work; large numbers of general-cargo longshoremen have equal

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mailed to all counsel (Docket entries of 8/8/73, 10/1/73, and 10/1/76).

[7] EEOC also argues that "at an earlier stage in this litigation" Local 1576 took a position inconsistent with its current argument about the threatened effects on the efficiency of the banana operation by itself asking "to have the jurisdictional limitations in its charter lifted so that it could compete for other longshore work." EEOC Br. at 20. The district court's finding, and the evidence, were that Local 1576 had asked the ILA—not the district court—to "enlarge the charter." Pet. App. 47a; 71 Tr. 2425-26. The evidence does not suggest that such an enlargement, if granted, would have put an end to the specialized crews for banana handling.

or greater seniority, so that on any day that a banana ship is the only ship in port it can be expected that a large number of senior longshoremen who are not experienced in banana work would exercise their seniority rights to claim that work. It remains to the imagination to consider what accommodations the merged local might be able to make consistent with the court of appeals' ruling; the EEOC suggests none. One thing is clear: the system of specialized seniority that has proved to work efficiently in the past will no longer be able to operate. That result is an unnecessary interference in the business operations of Local 1576 and Southern Stevedoring.[8]

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the writ of certiorari should be granted to review the judgment of the court of appeals.

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[8] EEOC argues that there is no conflict between the decision below and *EEOC* v. *Local 14, International Union of Operating Engineers*, 553 F.2d 251 (CA 2 1977), because the Second Circuit in *Local 14* only ordered a hearing, and a hearing was held in this case. EEOC Br. at 10-11 n. 5. In addition to ordering a hearing, however, the Second Circuit announced the rule that was to be applied at that hearing: Title VII relief may not interfere with a defendant's business operations more than necessary. In this case a hearing was held, but the court of appeals disregarded the evidence about the likely effect of merger on the business of handling bananas and ordered the merger even though it is not necessary to remedy the only Title VII violation that has been found.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1147

LOCAL 1576,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.
Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF SOUTHERN STEVEDORING CO.

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Respondents.

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Southern Stevedoring Co. respectfully requests leave to file an amicus curiae brief in support of the petition for a writ of certiorari in this case. In support of this motion, Southern Stevedoring states as follows:

1) The company requested the consent of all parties to the filing of this brief. Consent was given by the attorneys for petitioner Local 1576, ILA, and for respondent Local 307, ILA. In addition, the Solicitor General of the United States gave his consent on behalf of the EEOC. However, the attorney for respondent Local 851, ILA, refused to consent to the filing of this brief.

2) The interest of Southern Stevedoring Co. in this case arises from the fact that Southern employs most of the members of Local 1576 at the port of Galveston,

Texas. The company hires these workers primarily to unload bananas, a highly competitive business which demands knowledgeable and productive workers. The members of Local 1576 are specialists in this kind of work and if the Fifth Circuit's order requiring a merger of all the ILA locals in Galveston is implemented, this specialized workforce will be lost. The resulting adverse impact on both Southern Stevedoring and Local 1576 will be substantial.

3) Because Southern Stevedoring is more knowledgeable than the other parties about what the adverse impact of the Fifth Circuit's merger order will be, the facts and analysis set forth in this amicus curiae brief will assist the Court in determining whether the petition for a writ of certiorari should be granted.

WHEREFORE, it is respectfully requested that this motion be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February ____, 1981 this motion and the attached amicus curiae brief were served by first class mail, postage prepaid, on the following:

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AMICUS CURIAE BRIEF

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STATEMENT OF INTEREST

Southern Stevedoring Co. wishes to file an amicus curiae brief in support of the petition for certiorari in this case because Southern believes that the Fifth Circuit's order will have a serious adverse impact on the members of the petitioner local and on the company's business. Southern Stevedoring employs members of Local 1576 to unload bananas at the port of Galveston, Texas. Local 1576 is the only local union which Southern uses to unload bananas and Galveston is the only port where Southern performs this work.

The work of unloading bananas is highly competitive and must be done in an extremely efficient manner in order to ensure a margin of profit and the freshness and quality of the product. Members of Local 1576 are specialists in this kind of work and are extremely adept at it. The Fifth Circuit's order requiring Local 1576 to merge with three other International Longshoremen's Association (ILA) locals in Galveston will destroy this specialization and severely harm Southern's ability to adequately serve its customers. Thus, the company has a real interest in the outcome of this case and wishes to urge this court to act favorably on Local 1576's petition.

SUMMARY OF ARGUMENT

The petition for certiorari in this case seeks review of a Fifth Circuit decision ordering a union to merge its members, its specialized work jurisdiction, its seniority system, its collective bargaining agreement, and its very identity into a much larger group of three other local unions. The adverse impact of such an order on the local union is clear and undeniable. The impact on Southern Stevedoring, the company which employs virtually all of the Local 1576 members is less obvious but no less severe. Working together, in a striking example of

labor-management cooperation, Southern Stevedoring and the members of Local 1567 have built a thriving business in unloading bananas at the port of Galveston. This business is seriously jeopardized by the Fifth Circuit's ruling because the court order requires Local 1576 to merge with three other locals which do only general stevedoring work. This dilution of a specialized workforce will mean that Southern Stevedoring will have to use untrained employees who are unfamiliar with the complex routine of unloading bananas. The negative impact of the court's order on this highly competitive and efficient business is truly incalculable.

The basis for the Fifth Circuit's merger order was its conclusion that the local ILA unions in the Texas Gulf ports are segregated by race and national origin and that this segregation denies the longshore workers equal job opportunities. Whatever may be said about the 36 other local unions under consideration in this lawsuit, it is clear that Local 1576 has not and does not now discriminate against any workers on the basis of race or national origin, and the District Court so found. Thus, inclusion of Local 1576 in the Fifth Circuit's merger order is without evidentiary support and is patently unfair. There is no doctrine of "guilt by association" under Title VII of the Civil Rights Act.

This Court should grant the petition for certiorari in this case in order to consider the novel remedy imposed by the Fifth Circuit. The propriety of merging local unions in a Title VII case has not been addressed by the Supreme Court. In this case, where the merger order is imposed on a local union which has not engaged in unlawful discrimination, and where the order will have a profound impact on both the members of Local 1576 and their employer, review by the Supreme Court is essential.

ARGUMENT

I. The Banana Trade is a Highly Competitive Business Which Demands an Efficient, Productive, and Knowledgeable Workforce in Order to Survive.

When a ship loaded with bananas docks at the port of Galveston, it is critical that those bananas be moved onto trucks quickly and efficiently for transportation to retail outlets. There are two reasons why efficiency is paramount. First, when the bananas are in the hold of the ship, they are refrigerated at 52 degrees. The trucks used to transport them are refrigerated at the same temperature. As long as the bananas are kept at this temperature they will neither freeze nor ripen. The only time when the bananas are outside this controlled environment is when they are being moved from the ship's hold to the trucks. If the exposure to the outside air is for any extended period of time, the bananas may be damaged. It is therefore essential that they be moved as quickly as possible.

The second reason for demanding a highly efficient unloading process is simply a matter of cost. Unloading bananas is a labor-intensive operation and in order to keep costs down it must be done quickly and without interruption. The ships are unloaded by one or two gangs of 52 men each. About half of those men are in the hold of the ship lifting boxes and putting them on a conveyor belt. There are men stationed at each level of the conveyor to ensure that the boxes keep moving. The conveyors bring the boxes up to the ship's deck and then off the ship onto the pier. At the pier, the remaining half of the gang moves the boxes off the conveyor and loads them onto trucks. Six trucks are loaded at one time and each must be packed according to a specific, pre-set pattern. There is no time to make mistakes — in order to keep the cost of this operation at

a competitive level, the boxes must come off the ship and be loaded onto the trucks at a rate of 3000 boxes per hour (50 boxes per minute).

The efficiency of this operation is not simply a matter of pride to the company. It is essential to maintain the business. As the president of Southern Stevedoring testified at a hearing before the District Court in this case, the banana companies always seek the lowest-cost port to unload their product. New Orleans used to handle a large amount of bananas but the companies left because the cost became too high. If the operation in Galveston becomes less efficient, the same thing could happen. The banana companies are already unloading some of their product at other ports in neighboring states, and Galveston is now in competition with those other ports to keep its share of the business.

Clearly, Southern Stevedoring needs experienced and hard-working employees to unload bananas in Galveston. The work is hard, physical labor and it permits no rest, relaxation, or interruption. In contrast to the other three ILA locals in Galveston, Local 1576 members continue working regardless of weather conditions. The other three locals stop work if it rains but continue to receive their regular hourly rate for the waiting time. Local 1576 members quit work only if Southern's superintendent and the 1576 business agent agree that conditions are hazardous or unsafe, and that has never happened. Southern Stevedoring must have a commitment from its employees to make the operation work. The company must have a specialized, experienced workforce which is willing to endure hardships. For over ten years, the members of Local 1576 have met and exceeded these requirements, and their work has been rewarded with a successful and thriving banana trade in Galveston.

II. The Fifth Circuit's Order Requiring Local 1576 to Merge With Three Other ILA Locals Will Reduce the Efficiency of Southern's Operations and Will Have a Serious Adverse Impact on the Company and Local 1576.

A. Southern Stevedoring Will No Longer Receive A Cohesive Group of Experienced Workers From The Union Hiring Hall.

Under the current system, Southern Stevedoring tells the leadership of Local 1576 how many workers it needs each day and the Local supplies that number from its hiring hall. The vast majority of these men have been working for Southern in the banana trade for years. They are familiar with how the unloading system operates and they know the importance of high productivity and carefully handling. If Local 1576 is merged with the other locals in Galveston there will be only one hiring hall and it will refer workers out in seniority order. With 500 workers in the other three locals and only 250 in Local 1576, it is obvious that the pool of trained banana workers will be seriously diluted. Indeed, the District Court found that most of the 1576 workers would be on the lower portion of a merged seniority list, so on days when the banana ships offer the only stevedoring work in Galveston, Southern Stevedoring may receive only a few, if any, experienced workers.

In a letter filed with the District Court on October 1, 1976, Ben Harris, the president of Southern Stevedoring, noted this potential problem:

> What will happen if the banana vessels represent 80% of the work in the port on any given call-out? With men being hired by

> seniority, we would probably have gangs of high seniority men, most of whom are not accustomed to working, with few men willing or capable of going into the hold or trucks to produce the necessary 3000 boxes per hour. This would create a chaotic condition and we would certainly not be discharging anything like our normal production.

With a merged local and a merged hiring hall, there would be little hope of reaching and maintaining the critical production rate necessary to keep the cost of unloading the boats at a competitive level. Because maintenance of the banana trade in Galveston is so dependent upon cost, there is a real danger that the work will be lost as a result of the court-ordered merger. Again, in Mr. Harris' words: "the answer is economics — business flows to the lower cost center. Anything tending to drive the cost of discharge up drives business away."

B. The Merger Will Deprive Local 1576 of the Business its Members have Worked so Diligently to Establish and, in Addition, Will Deprive Them of Their Chosen Collective Bargaining Representative and Their Separate Collective Bargaining Agreement.

The diffusion of the specialized workforce and the impact of that diffusion on the banana trade in Galveston would create serious problems for the members of Local 1576. To the extent that their seniority standing is diminished by the court-ordered merger they will have less opportunity to work and their earnings will decrease. If the merger results in even a marginal decrease in efficiency, Galveston could lose the banana trade entirely, thus reducing the number of jobs available and causing at least some of these employees to lose their earnings, their pension benefits,

and their health and welfare benefits. The harshness of these losses is obvious, but it is particularly cruel in this case because the members of Local 1576 have worked so hard over the years to build this trade and now are in danger of losing it through no fault of their own. As the District Court noted in its unpublished opinion:

> If merger is now allowed, Local 1576 members will find themselves at the bottom of the seniority list, and the other local members will be selected for the banana and green fruit work. Such a situation deprives the Local 1576 members of the fruits of their labors which they have cultivated for many years. There is a possibility also that with the disappearance of Local 1576 members from the banana trade, the banana industry might decide to take their business to a different port. This Court will not now countenance a decision which would give Locals 307, 329 and 851, without any claim of seniority in Local 1576, the benefits earned by Local 1576.

The court-ordered merger will also have significant ramifications for the right of Local 1576 members "to bargain collectively through representatives of their own choosing," a right bestowed upon them by section 7 of the National Labor Relations Act (NLRA). 29 U.S.C. § 157 (1970). These employees have always been represented by Local 1576. The Local was separately chartered by the ILA in 1937 as a "banana and green fruit" local. This separate charter and separate representation were consistent with the long-established holding of the NLRB that banana workers constitute an appropriate bargaining unit separate from general longshore workers. *See Mobile Steamship Association*, 8 NLRB 1297, 1313-14 (1938); *Aluminum Line*, 8 NLRB 1325, 1343-44 (1938). If the Fifth Circuit's order is implemented, this separate representation

consciously chosen by the members of Local 1576 will disappear because the necessary effect of the Court's order will be to merge the bargaining units as well as the local unions, The separate contract which Local 1576 has signed with Southern Stevedoring will be nullified. These employees will be merged with a much larger group of workers and their special interests will undoubtedly be subordinated to the will of that majority.

There are other employee rights under the NLRA which will also suffer under this court-ordered merger. The section 7 right to engage in collective activity is complemented by the right "to refrain from any or all of such activities . . . ." 29 U.S.C. § 157. Once the Local 1576 members are merged into the three other locals, they may well lose this option. The NLRB has repeatedly held that a decertification election can only be held within the certified or recognized bargaining unit. *See, e.g., W.T. Grant Co.,* 179 NLRB 670 (1969) and cases cited therein at footnote 2. A petition which seeks an election in only a portion of that unit will be dismissed without further consideration by the Board. Thus, if Local 1576 members are dissatisfied with their new "merged" union, they can effect a change or removal of that union only if a majority of the merged bargaining unit agrees with them. Again, the "new majority" will effectively dominate and control the current membership of Local 1576.

III. In Light of the District Court's Finding That Local 1576 did not Engage in Unlawful Discrimination, the Merger Order and its Attendant Adverse Consequences Cannot be Justified.

If there was specific evidence in this case that Local 1576 had discriminated against any racial or ethnic

groups by excluding them from membership or by referring workers to jobs in a discriminatory manner, then certainly the arguments set out above would be of little concern. One racial or ethnic group may not benefit by discriminating against another. But the evidence in this case demonstrates that Local 1576 did *not* discriminate against any longshoremen. The District Court specifically found that:

> Even though Local 1576 is predominantly Mexican-American, the evidence shows that it never discriminated against members of any racial group.

The evidence in the record shows that the members of Local 1576 have never been the victims of discrimination nor part of the system which created discrimination among the ILA locals in Galveston. The fact is that Local 1576 has always had a "separate identity" in terms of its union charter, its collective bargaining agreement, and its work jurisdiction. It has never been a signatory to the "Deep Sea Agreement" which governs the wages, hours and working conditions of the other three ILA locals. It has never done general stevedoring work; it handles only bananas and green fruit. If the members of Local 1576 wanted to do other work, they could and did work through the other locals. If the members of other locals wanted to unload bananas, they could and did work through the Local 1576 hiring hall. The record shows that Local 1576 never excluded any longshoremen who wanted to work. Indeed, the District Court found that the local had advertised over the radio in both English and Spanish in an effort to obtain additional longshoremen. This is not the action of a local union which excludes any ethnic or racial group from its membership.

In light of the District Court's finding that Local 1576 did not engage in discrimination, there is considerable question as to whether there is any legitimate basis for the Fifth Circuit's merger order. The Court of Appeals relied primarily on the "law of the case" doctrine, finding that in its 1975 decision it had already ordered the unions merged on the basis of a District Court finding that the segregation of the ILA locals throughout Texas "constitute[d] a pattern or practice depriving individuals of working opportunities, because of their race or national origin." *United States v. ILA*, 334 F. Supp. 976, 980 (S.D. Tex. 1971), *rev'd and remanded*, 511 F.2d 273, 280 (5th Cir.), *cert. denied*, 423 U.S. 994 (1975). Even assuming that the "law of the case" doctrine has some relevance to the Supreme Court's consideration of this petition,[1] it is clear that the Fifth Circuit's 1975 opinion and the District Court's 1971 opinion did not deal with the questions presented here. It is essential to recognize that the District Court's finding of a pattern or practice of discrimination was made in a case involving 37 different local unions in 10 different ports. 334 F. Supp at 977-78. The only portion of the District Court's 1971 opinion which specifically discussed Local 1576 did not indicate that 1576 had engaged in discrimination. On the contrary, the District Court indicated that the only restriction on the members of Local 1576 was imposed by the local's charter, which restricted them to banana and green fruit work. *Id.* at 981. There was no finding that the local excluded any longshoremen from performing this work.

A comparison of the District Court's 1979 opinion with its 1971 opinion reveals that the more recent opinion is much more complete in its consideration of the specific facts regarding Local 1576. This

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[1] *But see* Petition of Local 1576, ILA, for a Writ of Certiorari at 12 n.10.

individualized study of the Local was consistent with the Fifth Circuit's holding that segregated locals are not per se unlawful under Title VII. 511 F.2d at 280. The Court of Appeals indicated that a detailed study must be made to determine whether locals actually deny equal work opportunities. The District Court made such a study and found that Local 1576 had not engaged in unlawful discrimination, yet the Court of Appeals chose to substitute its own conclusion for that of the lower court on this point. This substitution was improper and imposed on the members of Local 1576 a novel remedial order they neither want nor deserve. The merger order should not, therefore, be permitted to stand.

CONCLUSION

Based on the facts and analysis set out above, the petition for a writ of certiorari in this case should be granted to permit Supreme Court consideration of whether the Fifth Circuit has properly exercised its remedial powers. Supreme Court review is essential here because the lower court's order infringes on important statutory rights, on the right of Local 1576 members to pursue their legitimate employment opportunities, and on Southern Stevedoring's ability to continue its business operations.

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